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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 445.

ACALUS L. PALMER, PLAINTIFF IN ERROR,

vs

ERWIN A. HUSSEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED OCTOBER 24, 1884.

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1 *Case on Appeal from an Order Denying Motion for Perpetual Stay of Execution.*

Court of Appeals.

ACALUS L. PALMER, Plaintiff and Respondent,
against
ERWIN A. HUSSEY, Defendant and Appellant.

On appeal from first judicial department.

Huntley & Bower, appellant's attorneys; Archibald W. Speir, respondent's attorney.

2 *Opinion of Court of Appeals.*

Court of Appeals.

ACALUS L. PALMER *vs.* ERWIN A. HUSSEY.

FINCH, *J.:*

The defendant having been discharged in bankruptcy asked for an order perpetually enjoining the plaintiff from enforcing a judgment obtained by him against the defendant. The motion was successfully resisted upon the ground that the debt represented by the judgment was of a character which the bankrupt act did not reach, because contracted in a fiduciary capacity and fraudulently. The proof of the latter fact was vested by the general term upon the conclusive effect of the judgment itself, which was held to establish beyond denial
3 the character of the debt as above described. This application of the doctrine of *res judicata* is here assailed upon the ground that the judgment is conclusive only as to issues material and necessary to the cause of action, and not as to questions incidental and subsidiary, even though actually litigated and decided. The action was substantially for the conversion of certain bonds. The complaint alleged that the plaintiff transferred the bonds to the defendant "as his agent and broker in a fiduciary capacity" upon an agreement evidenced by a written memorandum, which certified that such bonds were held "subject to the order of A. L. Palmer, at ten days' notice," the coupons to be collected for his account free of charge, and two per cent. per annum on par value of the bonds to be allowed him for interest. The complaint further alleged that the defendant, without plaintiff's permission, "fraudulently and willfully sold and disposed of and misapplied
4 the said bonds," and refused to deliver them up on demand.

The action was tried before a referee, who founds the facts charged by the complaint, and specifically that the bonds were received in fiduciary capacity, and were fraudulently and wilfully sold, disposed of, and misapplied. On this state of facts the appellant argues that the action in substance and effect was solely for a conversion; that the fiduciary character of the defendant and the fraudulent nature of his transfer were not essential elements of the cause of action; that they were immaterial and superfluous and not traversable; that the cause of action was complete without them; and

the ultimate judgment is conclusive only upon the fact of a conversion, and does not estop the defendant from now denying his fiduciary character and the fraudulent nature of his transfer of the bonds.

If upon the facts of the case the question mainly argued by
5 the learned counsel for the appellant was essential to a correct conclusion it might not be found free from difficulty; but its discussion will prove unnecessary to the view which we take of the case, for, granting all that is claimed by the respondent in this direction, and assuming for the sake of the argument that the judgment is conclusive, not merely upon the fact of conversion, but also upon the attendant and incidental facts of the fiduciary capacity and fraudulent conduct of the defendant, we are still of opinion that the debt evidenced by the judgment was within the effect and operation of the bankrupt's discharge and not excluded therefrom. The conclusive character of a judgment extends only to identical issues, and they must be such not merely in name but in fact and substance. If the vital issue of the later litigation has been in truth already determined by an earlier judgment it may not again be contested; but if it has not—if it is intrinsically
6 and substantially an entirely different issue, even though capable of being described in similar language or a common form of expression—then the truth is not excluded and the judgment no answer to the different issue. Applying this very plain proposition to the case at bar, we are to ascertain whether the "fiduciary capacity" and the "fraud," which, under the provisions of the bankrupt act, exclude from its protection debts tainted with those elements, are necessarily one and the same with the "fiduciary capacity" and the fraudulent sale and misappropriation of bonds found by the reference and evidenced by the judgment which is sought to be made conclusive. If they are *identical*—if they necessarily present one and the same issue—the judgment closes the door to further contest; but if not identical, or even if under simi-
7 lar description and name they may be essentially different, the judgment is either not conclusive at all or only becomes so when an examination of the facts upon which it is founded demonstrates the actual and real identity of the issues involved. We must, therefore, compare the respective issues, those involved in the determination of this motion and those which we have assumed were decided by the judgment, to ascertain whether they are in substance identical or different. It is settled in this court, in supposed accordance with the doctrine of the Federal courts, that the "fiduciary capacity" intended by the bankrupt act relates to cases of technical trust, not merely such as the law implies from the contract, but actual and expressly constituted, and in the manner that the "fraud" intended is an active or express fraud as distin-
8 guished from an implied or constructive one founded merely upon some breach of duty. (Hennequin *vs.* Clews, 77 N. Y., 427.) Taking this construction of the bankrupt act as a guide, the question raised on this motion—the precise issue to be decided—is whether Hussey held Palmer's bonds as his actual and technical

trustee, or became liable for their amount through an active and express fraud involving moral turpitude or intentional wrong.

It is very plain that this issue was not necessarily identical with that pleaded in Palmer's complaint and found in his favor by the referee. The fiduciary capacity there alleged and found might have been merely the implied trust resulting from an agency, and the fraud alleged and found only that implied from the agent's
9 breach of duty. If no more than this was involved in the judgment, it failed entirely to determine the issue which this motion presents, and therefore cannot dictate our decision, so that we are brought inevitably to an examination of the facts upon which the judgment for conversion vested, and to the inquiry whether the fiduciary capacity and the fraud which it established were or were not substantially the same with those referred to in the bankrupt act. The averments of the complaint, the findings of the referee, the facts stated in the affidavits, and those developed upon the motion demonstrate very conclusively that the only fiduciary capacity in which Hussey was acting when the debt in question was contracted originated in the fact of his agency and
10 was implied from that relation. The complaint alleges that he received the bonds "as agent and broker and in a fiduciary capacity," and upon an express written agreement to return them on ten days' notice. The referee finds that they were received in a fiduciary capacity upon the terms of such agreement. The affidavits and the evidence show no other or different trust or fiduciary relation than such as may be said always to exist in a case of agency. In every such case there is an element of trust and confidence, so that a breach of duty may be said to be a breach of trust, but the agent is nevertheless not a fiduciary within the meaning of the bankrupt act. This was so held, under the act of 1841, in the case of a factor who received the money of his principal and did not pay it over. (Chapman *vs.* Forsyth, 2 How., U. S. R., 202.)
11 Here the broker received the bonds of his principal and did not return them. In both cases there was a breach of duty, in some sense a violation of trust and confidence, but in neither, if we follow the authorities, did the debtor contract his liability in a fiduciary capacity within the meaning of the bankrupt act. There remains to be considered the question of fraud. The complaint alleges that the defendant "fraudulently and wilfully sold, disposed of, and misapplied the bonds." The referee finds the fact in that identical language. The proofs show the written agreement under which the bonds were received. That was: "These bonds we hold subject to the order of A. L. Palmer at ten days' notice, agreeing to collect the coupons for his account free of charge, and to
12 allow him two per cent. per annum interest on the par value of said bonds, said interest to commence and count June 1st, 1866." What the defendant did was to hypothecate these bonds for loans at a time when he was, or supposed himself to be, perfectly solvent and able upon any ten days' notice to redeem and restore them. Losses came and he was unable to redeem. He was liable for a conversion. We have already held on an earlier appeal

that whatever right he may have had to use these bonds he had none inconsistent with his duty to redeem them (59 N. Y., 647); but to some use of them he was certainly entitled. It is absurd to suppose that he was to pay two per cent. a year for the mere privilege of keeping securely the plaintiff's bonds. We are puzzled, as Palmer seems to have been, to understand what *what* possible use
13 of these bonds was contemplated and paid for, except as security for loans. We can discern no fraud in that case. The bailee may have been unwise in hypothecating them, and trusted too confidently in his ability to redeem, but we can very plainly see that he exercised only what he deemed was his right, and which he was at least excusable for so regarding. So far, therefore, as the referee finds that the disposition of the bonds was wilful and intentional the finding is true, but immaterial for any purpose. So far as he finds it to have been fraudulent we must admit the truth of the finding and give it precisely the meaning and force to which it is entitled. What is that meaning? It is quite certain that the fraud found is that only which may be implied from the violation
14 of the duty resting upon the defendant under his contract. It cannot be anything else, for nothing else was proven. There was no active express fraud, but simply one implied from an unjustifiable act. What he did was to hypothecate the bonds. That by itself was wrong only in the peril incurred. Done when and as it was it cannot be deemed an affirmative fraudulent act. There is no possible fraud in the transaction except that implied from the conversion. To some extent, as was said in Hennquin *vs.* Clews (supra), in most if not all cases of conversion some element of fraud or breach of duty exists in a greater or less degree, and if all such cases were intended to be excepted from the operation of a discharge in bankruptcy the provisions which discharge debts for the conversion of personal property would have no force.

15 It seems to us, therefore, quite clear that the judgment invoked decided no fact which is at issue here; that the fiduciary capacity and the fraud which it found and established was another and a very different thing from that which it is invoked to establish; that while the forms of expression and of phrase are the same, the substantial facts are diverse and far apart, and the judgment did not adjudge such active and affirmative fraud, such technical and express breach of trust, as bars the effect of the discharge, nor did it in terms profess to do so. The respondent argues further that the debtor has been guilty of laches in not sooner availing himself of his defence under the bankrupt act. (Monroe *vs.* Upton, 50 N. Y., 593.)

His petition was filed January 20th, 1868, and he was ad-
16 judged a bankrupt on the 24th of the same month. That was almost thirteen years ago. In the interval the plaintiff sued and recovered, caused the defendant's arrest, pursued him with supplemental proceedings, and had a receiver appointed without once being met by the discharge as a bar. This delay would be fatal but for a single fact. The discharge was never granted until the 17th day of May, 1880. The reason assigned is that during this long

interval the bankrupt was unable to raise the money necessary to pay the fees of officers and bear the expense of counsel in the proceedings. The explanation of this long delay satisfied the bankrupt court and the discharge was finally granted. Under the cir-
17 cumstances we think the delay is sufficiently explained. The orders of the general term and of the special term must be reversed and the motion granted with costs.

All concur. A copy.

H. E. SICKELS,
Reporter, per C.

D. B., 1 K. K.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

I, William A. Butler, clerk of the said city and county and clerk of the supreme court of said State for said county, do certify that I have compared the preceding with the certified copy of an opinion of the court of appeals in the action entitled Acalus L. Palmer agst. Edwin A. Hussey on file in my office and that the same is a correct transcript therefrom and the whole of such certified copy.

In witness whereof I have hereunto subscribed my name and affixed my official seal this 20th day of March, 1882.

[New York Seal.] WM. A. BUTLER, *Clerk.*

18 *Order of Supreme C'rt on Remittitur of Court of Appeals.*

At a special term of the supreme court held at the chambers thereof, at the court-house in the city of New York, on the 13th day of February, 1882.

Present: Hon. Charles Donohoe, justice.

ACALUS L. PALMER, Plaintiff,
against
ERWIN A. HUSSEY, Defendant.

On reading and filing the remittitur of the court of appeals in the above-entitled action, whereby it appears that the order of the general term of this court entered herein in the clerk's office of the city and county of New York on the 2nd of June, 1881, and dated
19 the 6th of May, 1881, affirming the order made by Daniels, J., on the 15th of March, 1881, herein, denying the defendant's motion for a perpetual stay of all proceedings by the plaintiff on the judgment herein, and the other relief demanded in the defendant's notice of motion, appealed from herein, was, on appeal to the said court of appeals, reversed, and that said order made by Daniels, J., on the 15th of March, 1881, was also reversed, and that it was further ordered and adjudged that the defendant's motion aforesaid should be granted, with costs, which have been adjusted at the sum of ($265.45) two hundred sixty-five dollars and forty-five cents.

Now, on motion of Huntley & Bower, attorneys for the defendant and appellant in the above-entitled action, it is ordered that the order and judgment of the said court of appeals be made the order and judgment of this court.

Affidavit.

Supreme Court.

COUNTY OF NEW YORK :

ACALUS L. PALMER *against* ERWIN A. HUSSEY.

CITY AND COUNTY OF NEW YORK, *ss.*

Erwin A. Hussey, being duly sworn, says:

I. That I am the defendant above named. On the 20th day of January, 1868, I duly filed a petition and schedule in the
29 United States district court for the eastern district of New York, in bankruptcy, praying that I should be adjudged by the court to be a bankrupt within the purview of said act (the bankrupt act), and that I should be decreed to have a certificate of discharge from all my debts provable under the same; that thereupon and on the 24th day of January, 1868, I was duly adjudicated a bankrupt; that afterward such proceedings were had in said court that on the 17th day of May, 1880, I was duly discharged from all my debts provable under said act by a regular discharge in bankruptcy, of which the following is a copy:

"Whereas Erwin A. Hussey, of the city of Brooklyn, in the county of Kings and State of New York, has been duly adjudged a bankrupt under the Revised Statutes of the United States, title 'bankruptcy,' and the acts of Congress passed in amendment thereto, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court that said Erwin A. Hussey be forever discharged from all debts and claims which by said title are made provable against his estate, and which existed on the twentieth day of January, one thousand eight hundred and sixty-eight, on which day the petition for adjudication was filed by him, excepting such debts, if any, as are by law excepted from the operation of a discharge in bankruptcy.

"Given under my hand and the seal of the court, at the city of Brooklyn, in the said district, this 17th day of May, A. D. one thousand eight hundred and eighty.

[L. S.] "CHAS. L. BENEDICT, *Judge.*"

That at the time of my adjudication in bankruptcy aforesaid I was practically without any funds whatever or any means wherewith to conduct the proceedings, and was unable to pay the expenses of the officers and the fees of counsel in the proceedings.

30 That by reason of said lack of means there was a delay in the prosecution of said bankruptcy proceedings, and that during all that time I was unable to procure any business or do anything whatever to raise money, and was therefore compelled to remain idle and to suffer the bankruptcy proceedings to lie unprosecuted.

That in this action my counsel, having engaged in it, carried it on for me without the payment of his fees, and they remain still unpaid.

That afterward and as soon as I could obtain the means said proceedings in bankruptcy were prosecuted and conducted to a successful termination, and my discharge was obtained, as already stated.

That among other grounds of objection to my discharge in bankruptcy made by the plaintiff it was charged that I have been guilty of improper and undue delay in said proceedings.

That that question was presented to the court and fully explained, and the court decided that I was not guilty of laches, and was entitled to my discharge.

II. That on or about the 19th day of October, 1868, the plaintiff commenced this action against me, alleging the conversion of certain United States bonds, more particularly described in the complaint and agreement annexed, of which the following is a copy:

(The complaint and agreement will be found at folio — of this book.)

III. That it is true that I received the bonds set out in said agreement, under the terms and conditions therein named; that on receiving said bonds I used them as I deemed I had a right to do under said agreement, and afterward as I required money I hypothecated them for the purpose of raising the same; that at that time I was every way responsible—was a man of large means—being worth at least $500,000, and had no reason to believe that I should not be able at any and all times to return said bonds according to the terms of said agreement, but that owing to
31 large and numerous losses by the failure of parties indebted to me, and otherwise, I subsequently became insolvent, and when called upon to return said bonds, some three years after I had received them, on the 2d day of January, 1868, I was unable so to do; that thereupon this action was brought against me, and a judgment was rendered against me for the conversion of said bonds on the 16th day of May, 1874, for the sum of $32,128.57.

That no charge of intent to defraud, other than that technically inferred by law, could be charged or sustained against me, and that my entire conduct with reference to said bonds and all my dealings with them were upright and honorable.

That at the time of the issuing of the summons herein I was arrested under an order of arrest, but that on giving bail I was released from custody; that afterward, and after the docketing of the judgment herein, an execution against my person or body was issued and I was committed to close custody.

IV. That thereupon, and on or about the 15th day of October, 1874, I petitioned the Hon. Henry A. Moore, judge of the county court of Kings county, that my estate might be assigned for the benefit of all my creditors, and that my person might be thereafter exempted from imprisonment, by reason of any debts arising from contracts previously made, and if arrested before the determination of those proceedings that I be discharged from imprisonment, and for such other and further relief as I might be entitled to, pursuant to the provisions of article 5, title 1, chap. 5, part 2 of the Revised

Statutes of the State of New York, entitled "Of voluntary assignments of an insolvent for the purpose of exonerating his person from imprisonment."

That thereafter such proceedings were had before the said Henry A. Moore, county judge, that on or about the 2d day of January, 1875, said judge, among other things, ordered and directed that an assignment be made by me to Bernard J. York, of the city of Brooklyn, the assignee appointed by said judge, of all of my
32 estate excepting such articles as are by law exempt from execution.

That I thereupon complied with said order, and did on the same day execute a proper assignment to said York, and delivered to him such property; whereupon, and on the same day, an order was made, as prayed for in my petition, exempting me from arrest and imprisonment by reason of such debts, and, if arrested, that I be discharged from my imprisonment, and that afterward I was discharged from my imprisonment in conformity with said order.

V. That afterward, and on or about the 18th day of December, 1879, the plaintiff herein, by his attorney, A. W. Speir, obtained from the Hon. Jasper W. Gilbert, one of the justices of the supreme court of this State, a writ of certiorari to renew the proceedings had before said county judge, Henry A. Moore; that upon the hearing of such writ of certiorari at the special term of said court, held by Mr. Justice Gilbert, for the month of January, 1880, said writ of certiorari was quashed with costs, and judgment was duly entered in said court quashing said writ, and directing that the plaintiff herein pay the costs.

VI. That prior to said discharge in bankruptcy, and during the year 1879, the plaintiff initiated "supplementary" proceedings against me in this court, which were finally stayed by an order in the district court in bankruptcy.

VII. That during said proceedings, supplementary to execution, and while they were pending, the plaintiff obtained the appointment of Wm. J. Marrin, Esq., as receiver in said proceedings, with the usual powers, but that no proceedings were taken by him until after the decision of the bankruptcy court that a discharge in bankruptcy should be granted to me.

That thereupon, but before said discharge could be obtained, and on or about the 6th day of May, 1880, said receiver com-
33 menced an action in the superior court of the city of New York against me and William R. Taylor, who had purchased my assets at public auction of my assignee in the exoneration from arrest proceedings aforesaid, on the 25th day of February, 1878.

The prayer of the complaint in said action is as follows:

"Wherefore plaintiff demands judgment that the said insolvency and exoneration-from-arrest proceedings (being the same as referred to in paragraph IV hereof) be declared illegal and void, and that the said defendants be ordered to transfer and assign said property to plaintiff as receiver herein, and that said plaintiff have leave to sell said property, or so much as shall be necessary to satisfy said

judgment of the said Palmer, and for such other and further relief as shall be deemed just in the premises."

VIII. That I have had no opportunity in which to avail myself of the advantage of my discharge, and the debt on which the judgment herein was recovered accrued before the filing of my petition in bankruptcy, viz., on or before the 12th day of January, 1868, and is extinguished by said discharge.

Wherefore I pray that an order may be made herein that the plaintiff herein and his attorneys should be perpetually enjoined from issuing execution under the judgment herein, and, if execution has been issued, from enforcing the same, and from collecting or attempting to collect the judgment herein, or in any way enforcing or attempting to enforce the judgment herein, and that all proceedings in this action, or founded on the cause of action herein, on the part of the plaintiff herein, his attorneys and agents, and on the
34 part of the receiver in supplementary proceedings aforesaid, be perpetually enjoined and stayed.

E. A. HUSSEY.

Sworn to before me this 12th day of June, 1880.

[L. S.] GEORGE E. CARPENTER,
Notary Public, No. 252, City and County of New York.

N. Y. Supreme Court.

ACALUS L. PALMER *against* ERWIN A. HUSSEY.

CITY AND COUNTY OF NEW YORK, *ss:*

Archibald W. Speir, being duly sworn, says he is the attorney for the above-named Palmer; that a motion was argued before Hon. —— Westbrook, a justice of this court, on the — day of ——, and by consent the papers on the part of Palmer were to be submitted to-day.

Deponent further says that, owing to professional engagements and unforeseen delays therein, owing to the adjournments of the courts, deponent has not had time to examine the records and prepare the proper papers in this motion; and deponent is in-
35 formed that Mr. Justice Westbrook is not within the city and county of New York.

A. W. SPIER.

Sworn to before me this 9th July, 1880.

JOHN P. GAU,
Notary Public, N. Y. Co. (49).

N. Y. Supreme Court.

ACALUS L. PALMER *against* ERWIN A. HUSSEY.

On the foregoing affidavit let the plaintiff Palmer's attorney have ten days further time to prepare and serve the papers herein.

9th July, 1880.

C. DONOHUE, *J.*

36 Supreme Court of New York.

ACALUS L. PALMER, Pl't'ff, *against* ERWIN A. HUSSEY, Def't.

CITY AND COUNTY OF NEW YORK, *ss:*

I. Archibald W. Spier, being duly sworn, says he is the private counsel of Acalus L. Palmer, the above-named defendant.

II. That an action was begun in the superior court of the city of New York by William J. Marrin, receiver, &c., of the estate and property of Erwin A. Hussey, one of the defendants, against the said Erwin A. Hussey and William R. Taylor, defendants, on or about the 6th day of June, 1880.

III. That said action was begun by the said receiver plaintiff after having obtained an order duly made by the Hon. Hooper C. Van Voorst, one of the judges of the said court, and was pending in said court when the notice of motion was served in the proceedings upon deponent, and which said action is now pending.

IV. That the said Hussey and Taylor, defendants, have appeared in said action by their attorneys, Huntley and Bower, who served a general appearance in said action on the plaintiff's attorney on the 24th day of May, 1880, and filed and served an affidavit of merits in said action.

37 V. That the said defendants' attorneys have obtained two extensions of time to plead in said action from the judges of the superior court, and that on the 3d day of July, after this motion had been argued, the said defendants' attorneys obtained another extension of twenty days to plead in the action pending in the superior court.

VI. That the said action was brought by the said receiver to set aside and vacate certain insolvency proceedings taken by the said Hussey and for leave to sell certain property belonging to said Hussey and claimed or said to be claimed by the defendant, Taylor, as owner thereof and acquired since the said bankruptcy adjudication.

VII. Deponent further says that the said property is not mentioned in the schedule of bankruptcy filed by the said Hussey, nor does he claim that he acquired it previous to the bankruptcy proceedings.

VIII. Deponent further says he has good reason to believe and alleges that this application to the supreme court is made for the purpose of delaying and hindering the determination of the action in said superior court, and that if the said Hussey has any defense or that his alleged proceedings in bankruptcy are a bar to this action in the superior court, the same should be set forth by answer or demurrer and trial according to the usual practice of this court, and that the said attorneys for the defendants seek to have these matters and issues tried upon affidavits instead of according to the usual practice of the courts.

IX. Deponent further says that the said Huntley & Bower, on or about the month of October, 1879, obtained an *ex parte* stay of proceedings from the United States district court for the eastern district of New York in bankruptcy, staying all proceeding on the

part of said judgment creditor Palmer in the supplementary
38 proceedings for the collection and enforcement of this judgment.

X. That thereupon and immediately thereafter deponent obtained an order from the said United States district court vacating and setting aside the stay of proceedings issued by said court as to all property acquired by said Hussey after the 24th day of January, 1868, and that the discharge in bankruptcy does not affect this property, and a copy of said last-named order is hereto attached and marked Exhibit —.

XI. Deponent further says that he was the attorney for the said Palmer in the year 1868; that after the said Hussey had been adjudicated a bankrupt on the 27th day of January, 1868, a demand was made upon said Hussey for the bonds alleged to have been fraudulently converted by the said Hussey, belonging to the said Palmer, and the said Palmer brought an action against the said Hussey for the fraudulent conversion of said bonds in the supreme court of the State of New York on the 19th day of October, 1868, and in the complaint therein the said Palmer alleged that the said Hussey had received the said bonds in a fiduciary capacity, and had fraudulently and willfully misapplied said bonds.

XII. On and long after the said Hussey had been adjudicated a bankrupt, the — day of November, 1868, the defendant Hussey served an answer — said action, in which he alleged a complete settlement of the matter at issue and set up a counter-claim against the said Palmer for $1,415.60 *dollars*. The plaintiff, Palmer, in his reply in said action, denied the said counter-claim.

XIII. That the said action was duly tried on the issues, and the said referee found as a matter of fact "that the bonds were received in a fiduciary capacity" by the said defendant, and that the said defendant without the authority or consent or permission of the plaintiff, fraudulently and willfully sold, disposed of, and mis-
39 applied said bonds, and judgment was duly entered accordingly on the 16th day of May, 1874, for $32,128.57 *dollars*.

XIV. That the said Hussey was arrested and held in 25,000 dollars bail by an order of the said supreme court in said action in the complaint and affidavit which set up the same facts as stated in the complaint, and the additional fact that on the 27th day of January, 1868, the bonds had been demanded on behalf [of] the plaintiff from the said defendant.

That said order of arrest was affirmed in all things by a judgment of the court of appeals on the 8th day of May, 1874, and the judgment in the action has not been appealed from.

XV. That the said Palmer was a non-resident of the State of New York, and resided and now resides in St. Johns, New Brunswick.

XVI. That deponent is informed and believes the said Palmer had no notice of the said bankruptcy proceedings until long after he had obtained judgment in said action, and deponent had no knowledge of said bankruptcy proceedings until September, 1879, and that the said Hussey did not name the said Palmer as a creditor in these

bankruptcy proceedings until about September, 1879, long after the judgment had been obtained.

XVII. That the said Hussey did not plead his adjudication in bankruptcy in the said action by Palmer, as required by the practice of the State court.

XVIII. That deponent made several efforts to find the said Hussey and examined him in supplementary proceedings after the judgment was obtained, but could not find him until June, 1879.

XIX. That the facts as stated in the affidavit in the 3d
40 paragraph relating to the cause of action are false and misleading; it is a statement of a defence—a defence which is not true; the true facts were determined on the trial, and the matter is *res adjudicata* by the judgment of the supreme court in the action on the 19th day of October, 1874, and the affirmation of the order of arrest by the judgment of the court of appeals on the 8th day of May, 1874, which substantially affirmed the judgment of the supreme court.

XX. That the said Hussey swore in his answer in said action that he had a settlement of account with Palmer, and that said Palmer was found indebted therein to him in the sum of one thousand four hundred and fifteen and sixty-one hundredths dollars; that it appears from the foregoing facts that the statements of the said Hussey under oath are contradictory, and that his affidavits and statements are unworthy of credence. The referee before whom the action was tried affirmed this fact in rejecting and disallowing this counter-claim.

XXI. That the matter stated in the 3rd paragraph (fol. —) of Hussey's affidavit, tending to show that the cause of action accrued on the 2nd day of January, 1868, is false; and

XXII. That the facts as stated in Hussey's affidavit in the 6th paragraph are false and misleading, the inference being that the stay of proceedings issued is still in force as to the subject-matter of the superior court action, and also as to preventing the collection of this judgment, which is not true.

XXIII. That as to the allegations contained in the latter part of the first paragraph of Hussey's affidavit, at fol. —, the true fact is the judge in bankruptcy overruled the objections that were made to the discharge without passing upon the validity of the bankrupt proceedings, which is proved by the order vacating the stay, a copy of which is attached.

41 XXIV. That the allegations of Hussey's affidavit in paragraph seven are false and misleading in the statement that the receiver, William J. Marrin, took no proceedings until after the discharge in bankruptcy had been granted to Hussey.

Deponent says that the said receiver, Marrin, demanded of said Hussey a transfer of all his property, and also applied several times to the supreme court in supplementary proceedings for an order requiring said Hussey and third parties to deliver and convey to said receiver certain properties belonging to the said Hussey, and more particularly the property specified in the complaint in the action in the superior court, and which is not included in the bank-

ruptcy schedules, or claimed to be owned by Hussey, or received by him, after the date of the adjudication in bankruptcy of the said Hussey.

XXV. That in the action now pending in the superior court the matters at issue are the validity of a certain alleged discharge in proceedings for exoneration from arrest and discharge from imprisonment and an assignment made therein.

XXVI. That the said Hussey, after the said adjudication in bankruptcy, to wit, in or about the year 1874, stated said judgment in favor of the said Palmer and against the said Hussey (described in said Hussey's affidavit in paragraph III) as a valid judgment against him, the said Hussey, in his said schedules in the said insolvency proceedings.

XXVII. That deponent is informed and believes that neither William J. Marrin, receiver, and the plaintiff in the action in the superior court now pending, nor his attorney is a party to this motion, and that they have not been served with papers in this motion.

XXVIII. That deponent is informed and believes that Acalus L. Palmer, the judgment creditor, has not been served with a
42 notice of motion in this matter, and that this application is not properly before the court.

A. W. SPEIR.

Sworn to before me this 19th July, 1880.

JOHN D. DELAHUNTY,
Notary Public, New York City and County.

Order Vacating Stay.

EXHIBIT "A."

At a stated term of the United States court for the eastern district of New York, held at the court-house in the city of Brooklyn on the 30th day of September, 1879.

Present: Hon. Chas. L. Benedict, justice.

In re ERWIN A. HUSSEY, Bankrupt.

Order discharging stay.

On reading and filing the order to show cause herein, dated September 26th, 1879, and the affidavit of A. W. Speir, and on the proceedings herein, and after hearing counsel for the respective parties, now, on motion of A. W. Speir, attorney for Acalus L. Palmer, it is ordered that the stay granted in and by an order of the
43 22d day of September, instant, be, and the same is hereby, vacated, excepting that said order shall stand in force so far as to restrain Acalus L. Palmer, plaintiff in the action of Acalus L. Palmer *vs.* Erwin A. Hussey, his agents and attorneys, from executing the judgment in said action out of any property acquired by the bankrupt before the time of filing his petition in bankruptcy,

bankruptcy proceedings until about September, 1879, long after the judgment had been obtained.

XVII. That the said Hussey did not plead his adjudication in bankruptcy in the said action by Palmer, as required by the practice of the State court.

XVIII. That deponent made several efforts to find the said Hussey and examined him in supplementary proceedings after the judgment was obtained, but could not find him until June, 1879.

XIX. That the facts as stated in the affidavit in the 3d
40 paragraph relating to the cause of action are false and misleading; it is a statement of a defence—a defence which is not true; the true facts were determined on the trial, and the matter is *res adjudicata* by the judgment of the supreme court in the action on the 19th day of October, 1874, and the affirmation of the order of arrest by the judgment of the court of appeals on the 8th day of May, 1874, which substantially affirmed the judgment of the supreme court.

XX. That the said Hussey swore in his answer in said action that he had a settlement of account with Palmer, and that said Palmer was found indebted therein to him in the sum of one thousand four hundred and fifteen and sixty-one hundredths dollars; that it appears from the foregoing facts that the statements of the said Hussey under oath are contradictory, and that his affidavits and statements are unworthy of credence. The referee before whom the action was tried affirmed this fact in rejecting and disallowing this counter-claim.

XXI. That the matter stated in the 3rd paragraph (fol. —) of Hussey's affidavit, tending to show that the cause of action accrued on the 2nd day of January, 1868, is false; and

XXII. That the facts as stated in Hussey's affidavit in the 6th paragraph are false and misleading, the inference being that the stay of proceedings issued is still in force as to the subject-matter of the superior court action, and also as to preventing the collection of this judgment, which is not true.

XXIII. That as to the allegations contained in the latter part of the first paragraph of Hussey's affidavit, at fol. —, the true fact is the judge in bankruptcy overruled the objections that were made to the discharge without passing upon the validity of the bankrupt proceedings, which is proved by the order vacating the stay, a copy of which is attached.

41 XXIV. That the allegations of Hussey's affidavit in paragraph seven are false and misleading in the statement that the receiver, William J. Marrin, took no proceedings until after the discharge in bankruptcy had been granted to Hussey.

Deponent says that the said receiver, Marrin, demanded of said Hussey a transfer of all his property, and also applied several times to the supreme court in supplementary proceedings for an order requiring said Hussey and third parties to deliver and convey to said receiver certain properties belonging to the said Hussey, and more particularly the property specified in the complaint in the action in the superior court, and which is not included in the bank-

ruptcy schedules, or claimed to be owned by Hussey, or received by him, after the date of the adjudication in bankruptcy of the said Hussey.

XXV. That in the action now pending in the superior court the matters at issue are the validity of a certain alleged discharge in proceedings for exoneration from arrest and discharge from imprisonment and an assignment made therein.

XXVI. That the said Hussey, after the said adjudication in bankruptcy, to wit, in or about the year 1874, stated said judgment in favor of the said Palmer and against the said Hussey (described in said Hussey's affidavit in paragraph III) as a valid judgment against him, the said Hussey, in his said schedules in the said insolvency proceedings.

XXVII. That deponent is informed and believes that neither William J. Marrin, receiver, and the plaintiff in the action in the superior court now pending, nor his attorney is a party to this motion, and that they have not been served with papers in this motion.

XXVIII. That deponent is informed and believes that Acalus L. Palmer. the judgment creditor, has not been served with a
42 notice of motion in this matter, and that this application is not properly before the court.

A. W. SPEIR.

Sworn to before me this 19th July, 1880.

JOHN D. DELAHUNTY,
Notary Public, New York City and County.

Order Vacating Stay.

EXHIBIT "A."

At a stated term of the United States court for the eastern district of New York, held at the court-house in the city of Brooklyn on the 30th day of September, 1879.

Present: Hon. Chas. L. Benedict, justice.

In re ERWIN A. HUSSEY, Bankrupt.

Order discharging stay.

On reading and filing the order to show cause herein, dated September 26th, 1879, and the affidavit of A. W. Speir, and on the proceedings herein, and after hearing counsel for the respective parties, now, on motion of A. W. Speir, attorney for Acalus L. Palmer, it is ordered that the stay granted in and by an order of the
43 22d day of September, instant, be, and the same is hereby, vacated, excepting that said order shall stand in force so far as to restrain Acalus L. Palmer, plaintiff in the action of Acalus L. Palmer *vs.* Erwin A. Hussey, his agents and attorneys, from executing the judgment in said action out of any property acquired by the bankrupt before the time of filing his petition in bankruptcy,

with leave to the bankrupt to apply for a further stay on two days' notice to the moving party in this motion to vacate September 30th, 1879.

CHAS. L. BENEDICT.

Order Staying Palmer's Proceedings.

EXHIBIT "B."

At a stated term of the district court of the United States of America for the eastern district of New York, held at the United States court rooms in the city of Brooklyn the 22d day of September, A. D. 1879.

Present: The Hon. Chas. L. Benedict, judge.

In the Matter of ERWIN A. HUSSEY, Bankrupt.

It appearing by the affidavit of Erwin A. Hussey, the bankrupt above named, this day presented and filed, that Acalus L. Palmer, creditor named in the amended schedule of liabilities of said bankrupt, whose debt is provable in bankruptcy, is endeavoring by legal proceedings to enforce payment of said claim, now, upon
44 application of Huntley & Bower, attorneys for the above-named bankrupt, it is ordered that all proceedings on the part of the said Acalus L. Palmer, or his agents or attorneys, to enforce payment of the said claim be, and the same are hereby, stayed until the determination *of* this court of the question of said bankrupt discharge.

Witness the Hon. Chas. L. Benedict, judge of said court, and the seal thereof, at the United States court-rooms, in the city of Brooklyn and district aforesaid, this twenty-second day of September, A. D. 1879.

[L. S.] B. LINCOLN BENEDICT.

Opinion of Westbrook, J.

Supreme Court.

ACALUS L. PALMER *against* ERWIN A. HUSSEY.

CITY AND COUNTY OF NEW YORK:

I have not felt myself at liberty to examine the questions which this motion presents on its merits.

Leave to prosecute an action in the superior court which involved all points argued has been granted. That action is now pending there. I am not to assume that the court is not competent to do justice, and will not do it, but I assume the contrary.
45 This motion is denied solely on the ground that the comity of courts forbids an interference.

Motion denied without costs, and without prejudice to the right of the defendant to make such a motion to the superior court as he may be advised is proper in the premises.

August 11, 1880. T. R. W.

At special term of the supreme court, held at chambers, in the court-house, in and for the city and county of New York, on the 26th day of August, 1880.

Present: Hon. T. R. Westbrook, justice.

ACALUS L. PALMER *against* ERWIN A. HUSSEY.

On reading and filing the notice of motion herein, dated the 12th day of June, 1880, the affidavit of Erwin A. Hussey, thereto attached, and the certified extract from the referee's report herein, and the affidavit of Archibald W. Speir, Esq., in opposition to the motion, and after hearing R. H. Huntley, Esq., of counsel for the defendant, in support of the motion, and Archibald W. Speir, Esq., of counsel for plaintiff, in opposition thereto:

Now, on motion of Archibald W. Speir, Esq., attorney for
46 the plaintiff, it is ordered that said motion be denied without costs, and without prejudice to the right of the defendant to make such a motion to, or defense in the, superior court as he may be advised is proper in the premises.

This motion is denied solely on the ground that the comity of courts forbids an interference by this court with an action pending in the superior court, even though it may have the legal power so to do.

The Hon. Hooper C. Van Vorst, judge of the superior court, *having* given William J. Marrin, Esq., the receiver in supplementary proceedings of the defendant, leave to commence a judgment creditor's action in said court against the defendant and another, in which action the defendant's discharge in bankruptcy may be set up.

Enter.

T. R. WESTBROOK.

47 *Notice of Appeal.*

Supreme Court.

ACALUS L. PALMER, Plaintiff,
against
ERWIN A. HUSSEY, Defendant.

CITY AND COUNTY OF NEW YORK:

Please take notice that the above-named defendant appeals to the general term of this court from the order herein entered on the 27th day of August, 1880, denying the defendant's motion for a perpetual stay of all proceedings on the judgment herein, and for such other and further relief as to the court should seem meet, and from each and every part and the whole of said order.

Yours, &c., HUNTLEY & BOWER,
Def't's Att'ys, 35 Pine St.

Dated New York, September 13, 1880.

To Archibald W. Speir, Esq., pl'ff's att'y; William A. Butler, Esq., cl'k s'p'r court.

48 *Appeal from an Order Denying Motion for a Perpetual Stay of Execution.*

Supreme Court, General Term, First Dep't. Oct. Term, 1880.

Noah Davis, P. J.; Brady & Barrett, J. J.
R. H. Huntley, for app'l't; A. W. Speir, for resp't.

ACALUS L. PALMER, Resp'd't, *vs.* ERWIN A. HUSSEY, App't.

Per Curiam:

There was really no question of comity involved in this case. The question was whether the judgment was discharged by the proceedings in bankruptcy. If it was we should not permit our receiver to proceed further with a suit upon such judgment in another court. If it was not discharged the special term should so decide, and then we can review its judgment.

As there is a statement in the order appealed from that the court did not consider the merits, we should simply send the case back for adjudication. There is nothing for us to review at present affecting the merits.

The order appealed from is reversed with $10 costs and disbursements of the appeal, and the motion remitted to the special term for a hearing upon the merits.

49 At a general term of the supreme court of the State of New York, held in and for the first department, at the court-house in the city of New York, on the 26th day of November, 1880.

Present: Hon. Noah Davis, P. J.; Hon. John R. Brady, Hon. Geo. C. Barrett, J. J.

ACALUS L. PALMER, Plaintiff and Respondent,
against
ERWIN A. HUSSEY, Defendant and Appellant.

The appeal from the order entered herein on the 27th day of August, 1880, denying the defendant's motion for a perpetual stay of all proceedings on the judgment herein having been heard at the general term, and after hearing Richard H. Huntley, Esq., of counsel for the appellant, and Archibald W. Speir, Esq., of counsel for the respondent:

Now, on motion of Huntley & Bower, Esqs., attorneys for the appellant, it is ordered that the said order appealed from be reversed, with ten dollars costs and the disbursements to the appellant.

And it is further ordered that the said defendant's motion for a perpetual stay of all proceedings on the judgment herein be, and the same hereby is, remitted to the special term for a hearing upon the merits.

Endorsement.

50 SIR: Please to take notice that the within is a copy of an order duly made herein and this day entered in the clerk's office of this court at the court-house in the city of New York in the within-entitled action.

And also take notice that the hearing on the merits of the defendant's motion for a perpetual stay of all proceedings on the judgment herein, directed in the within order, will be heard at a special term of this court, to be held at the chambers thereof, at the court-house in the city of New York, on the first Monday of December, 1880, at the opening of the court on that day, or as soon thereafter as counsel can be heard, and application will then and there be made that said motion be granted.

Yours, &c., HUNTLEY & BOWER,
Def't's Att'ys.

Dated New York, Nov. 27, 1880.

To A. W. Speir, Esq., pl'ff's att'y.

51 At a special term of the supreme court, held in and for the city and county of New York, at the chambers thereof, at the court-house in said city, on the 14th day of December, 1880.

Present: Hon. Charles Daniels, justice.

ACALUS L. PALMER *against* ERWIN A. HUSSEY.

The hearing on the merits of the defendant's motion for a perpetual stay of all proceedings on the judgment in this action, directed by the order of the general term of this court, dated the 26th day of November, 1880, coming on to be heard, after hearing Richard H. Huntley, Esq., of counsel for the defendants, for the motion, and A. W. Speir, Esq., of counsel for the plaintiff, opposed; and the counsel for the plaintiff moving the court that it be referred to a referee to take testimony as to the facts and circumstances of the alleged conversion of the plaintiff's bonds mentioned in the complaint in this action, and the counsel for the defendant opposing such a reference:

Now, at the instance and direction of the court, and for its proper information as to the facts to be considered, it is ordered that it be referred to William H. Leonard, Esq., counsellor-at-law, of the city of New York, to take such testimony as may be produced before him by either party to this cause as to the circumstances and facts of the alleged conversion of plaintiff's bonds mentioned in the complaint in this action, and to report the same to this court with all convenient speed.

52 And it is further ordered that such reference proceed on five days' notice by either party, and continue from day to day until completed.

And it is further ordered that the hearing on the merits of the defendant's motion for a perpetual stay of all proceedings on the judgment in this action ordered by the general term as aforesaid stand adjourned until the coming in of the report of said referee.

And it is further ordered that the fees of the referee on such reference be paid by the party receiving the report, and be then subject to the order of this court in final determination of this motion.

A copy.

WILLIAM A. BUTLER.

Supreme Court.

ACALUS L. PALMER, Pl'ff, *against* ERWIN A. HUSSEY, Def't.

To the supreme court:

The subscriber, William H. Leonard, referee, to whom it was referred by an order of this court, dated the 14th day of December, 1830, made before the Hon. Charles Daniels, justice, to take such testimony as might be produced before him by either party to this cause as to the circumstances and facts of the alleged conversion of the plaintiff's bonds mentioned in the complaint in this action, and to report the same to this court with all convenient speed, respectfully reports:

53 That he has been attended by the said parties and their counsel, respectively, and has taken the testimony directed to be taken by the said order, which he caused to be reduced to writing by a stenographer in his presence; the witnesses were each sworn before being examined, in the usual form, to testify the truth, the whole truth, and nothing but the truth; and after the examination was closed the minutes of the stenographer were plainly written out and read over by each witness, and the testimony so written out and read over was subscribed by the witnesses, Palmer, Hussey, Bishop, and Speir, and they were each resworn that the deposition so subscribed by them, respectively, was true.

The counsel for the said parties, respectively, agreed that the testimony of the witnesses, Parkhurst, Wright, and Scott, so written out and read over by them, respectively, need not be subscribed or sworn to as a deposition.

The said testimony has been certified by me and is returned herewith, together with the exhibits referred to by the said witnesses, also marked by me as Exhibits A, B, C, D, E, F, G, H, I, K, L, M, N, O.

All of which is respectfully submitted,

WM. H. LEONARD, *Referee.*

New York, February 2d, 1881.

54 *Notice of Motion.*

Supreme Court.

ACALUS L. PALMER, Pl'ff, *ag'st* ERWIN A. HUSSEY, Def't.

CITY AND COUNTY OF NEW YORK:

Please to take notice that on the report of the Hon. William H. Leonard, referee, which has been duly made herein, a copy of which is hereto annexed, and on all the papers and proceedings herein, the adjourned hearing of the motion for a perpetual stay will be had at a special term of this court, at the chambers thereof, on the third Monday of February, 1881, at the opening of the court, or as soon thereafter as counsel can be heard, and an application made on be-

half of the defendant that the motion be denied, and for such other or further relief as to the court may seem fit.

Yours, &c.,

A. W. SPEIR,
Pl'ff's Attorney.

New York, 5th February, 1881.

To Huntly & Bower, def't's att'ys.

55 (*Judgment Roll.*) *Summons for Relief.*

New York Supreme Court.

ACALUS L. PALMER, Plaintiff,
against
ERWIN A. HUSSEY, Defendant.

CITY AND COUNTY OF NEW YORK.

To the above named defendant:

You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said complaint on the subscriber at his office, No. 68 Wall street, New York city, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid the plaintiff in this action will apply to the court for the relief demanded in the complaint.

Dated September 7, 1868.

ARCH. W. SPEIR,
Plaintiff's Attorney, No. 68 Wall Street.

56 N. Y. Supreme Court.

ACALUS L. PALMER *vs.* ERWIN A. HUSSEY.

CITY AND COUNTY OF NEW YORK:

To the sheriff of the city and county of New York:

You are required forthwith to arrest the defendant, Erwin A. Hussey, and to hold him to bail in the sum of twenty-five thousand dollars, and to return this order to Archibald W. Speir, plaintiff's attorney, at No. 68 Wall street, on the 24th day of October, 1868.

Dated October 19, 1878.

D. P. INGRAHAM, *Justice.*

Arch. W. Speir, plaintiff's attorney; E. A. Hussey, 48 or 50 Broad street, room 17.

57 N. Y. Supreme Court.

ACALUS L. PALMER, Plaintiff,
against
ERWIN A. HUSSEY, Defendant.

CITY AND COUNTY OF NEW YORK:

The complaint of Acalus L. Palmer, by Archibald W. Spier, his attorney, shows to this court:

That prior to the 11th day of May, 1866, he held in the possession

of Brown Brothers & Co., and belonging to him, ten Government bonds, known as United States seven-thirty bonds, numbered 62422, 62423, and numbers 62441 to 62448, both inclusive, of five hundred hundred dollars each, and also one hundred and thirty-two of said Government bonds, numbered 136,108, 136,109, 135,953, 135,954, and numbers 135,957 to 135,984, both inclusive, and numbers 125,-153, 125,154, and numbers 36001 to 36100, both inclusive, of $100 each, and numbers 69,021 to 69,028, both inclusive, of $50 each; that at the request of the defendant, then doing business in the city of New York under the name of "E. A. Hussey & Co.," he transferred to them the aforesaid several bonds, and also shortly before that time he transferred to the defendant one other United States bond, known as the United States six per cent. five-twenty bonds, for $1,000; that all of said bonds amounted, as appears upon them in print or writing, to the sum of $19,600; that the same were received by the defendant from the plaintiff, as his agent and broker, in a fiduciary capacity, upon the arrangement and agreement as contained and set forth in the copy paper signed and delivered by the defendant to the plaintiff, hereto annexed, and at the time and place therein
58 stated, and forming a part of this complaint; that the said defendant, without the authority or permission of the plaintiff, has fraudulently and wilfully sold, disposed of, and misapplied the said bonds, and has refused to deliver up the same to the said plaintiff, who has frequently demanded the same from him, and given the notice so to do as required in the agreement, of which the annexed is a copy.

Wherefore the plaintiff demands judgment for his damages herein to the amount of forty thousand dollars and costs of this action.

A. W. SPIER,
Pl'ff's Att'y.

(A copy of the agreement referred to in the complaint will be found at folio —— of this book.)

Verification.

Supreme Court.

CITY AND COUNTY OF NEW YORK :

ACALUS L. PALMER *against* ERWIN A. HUSSEY.

CITY AND COUNTY OF SAINT JOHNS, *ss:*

Stephen Wiggins Palmer, being duly sworn, says that the paper hereto annexed is a copy of an original paper signed by the defendant herein, who was doing business in said city at the time under the name of "E. A. Hussey & Co.," and delivered by him to the plaintiff on or about the date of the same; that the bonds therein named were delivered to the defendant by the persons
59 therein named in the plaintiff's order, as deponent has been informed by both the defendant and the plaintiff, and upon

the terms and conditions therein set forth, and this deponent knows that the same was signed by the defendant; that this deponent several times demanded of the defendant the bonds therein described, to be delivered up to plaintiff, which defendant refused; that on or about the twenty-seventh day of January last past he demanded that the defendant should deliver them up in ten days from such demand; that more than ten days have long since expired, and the defendant still refuses to deliver up the same, but admits he has disposed of the same.

And deponent further says, on the knowledge obtained by him in his business relations between the parties, that said defendant had no right or authority to dispose of the said bonds.

STEPHEN WIGGINS PALMER.

(Jurat.)

Supreme Court.

ACALUS L. PALMER *against* ERWIN A. HUSSEY.

CITY AND COUNTY OF NEW YORK:

The defendant answers the complaint:

First. That he denies that he received said bonds from the plaintiff as his agent and broker; and he denies that he received them in a fiduciary capacity upon any arrangement and agreement whatever; and he denies that he has fraudulently or wilfully sold,
60 disposed of, or misapplied the said bonds; and he denies that he has in any way whatever used said bonds otherwise than as is provided in the agreement set forth as a part of the complaint herein and as well understood between the plaintiff and this defendant that said bonds should be used.

Second. And, further answering, this defendant says that for a long time prior to May 11, 1866, he had had mutual dealings with the plaintiff, through the agency of the plaintiff's brother, one Stephen W. Palmer; that said transactions were of the usual and ordinary kind existing between merchants in this city and parties residing abroad, the plaintiff then and now residing in the British Province of New Brunswick; that this defendant was then a shipping and commission merchant, and as such transacted business with and for the plaintiff; that some time prior to May 11, 1866, this defendant, under instructions from the plaintiff and as his agent, bought, through Messrs. Brown Brothers & Co., all the bonds set out in said agreement except the 5.20 bond therein mentioned; that afterwards this defendant bought for the plaintiff the said 5.20 bond and kept the same in his possession with the plaintiff's knowledge and assent; that after the purchase of all the said bonds this defendant changed his business from that of a shipping and commission merchant to that of a banker and stock-broker, and in view of such change suggested to the plaintiff that he in such business could use profitably for himself the said bonds of the plaintiff if he was disposed to lend them to this defendant; that thereupon, and for the purpose of this defendant using said bonds in his business as a broker and banker to raise money therewith and thereby

to increase his capital, and to use the same as money, this defendant agreed that if the plaintiff would loan him said bonds he would collect the coupons thereto attached free of charge and pass the proceeds of said coupons so collected to the credit of the plaintiff, and that he would in addition thereto pay to the plaintiff at the rate of two per centum per annum extra interest for the
61 use of said bonds; that said bonds were taken by this defendant under said agreement, and were used by him strictly in accordance therewith, and not otherwise.

Third. And, further answering, and as a separate and distinct defence, this defendant says that the agreement annexed to the complaint herein and forming a part thereof, and the agreement hereinbefore set forth, is and was in itself corrupt and usurious and contrary to and in violation of the usury laws of the State of New York, in which State said contract was made, and was intended to be an agreement to pay more than seven per centum, to wit, nine per centum, per annum for the use, loan, and forbearance of money, and by said agreement this defendant agreed to pay said usurious rate to the plaintiff, and the plaintiff agreed to receive the same for said loan then and there made.

Fourth. And, further answering, and as a separate and distinct defence to any claim which the plaintiff may seek to establish against this defendant by reason of said agreement annexed to the complaint, and by reason of the loan of paid bonds, this defendant says that between the 11th day of May, 1886, and the month of December, 1867, there were accounts and dealings between the plaintiff and this defendant; that said account contained large debits and credits; that in the latter part of said month of December, 1867, the plaintiff, through his said agent, Stephen W. Palmer, and this defendant had a full and complete settlement and adjustment of their accounts, in which settlement the plaintiff was credited the full value of said bonds, and that on said settlement it was found and adjusted that the plaintiff was indebted to this defendant in the sum of fourteen hundred and fifteen dollars and sixty cents, ($1,415.60;) that this defendant has paid the plaintiff in full for said bonds, and does not and did not at the commencement of this action owe him anything thereon.

Fifth. And, further answering, and as a set-off and counterclaim to any sum to which the plaintiff may appear to be entitled
62 on the trial of this action, and repeating and now alleging all that has been hereinbefore alleged as a defence, this defendant says that during the time of his said business connection with the plaintiff he paid, laid out, and expended for and on account of the plaintiff large sums of money in the purchase of merchandise, stocks, and United States bonds, and sums greatly in excess of any and all sums received by him from the plaintiff, including said bonds and their proceeds, and that at the termination of said business connection, in the month of December, 1867, an account was stated between the plaintiff and this defendant, whereby it was found, and such was and is the fact, that the plaintiff was indebted to this defendant for and on account of said sums so paid, laid out, and ex-

pended for the plaintiff in the sum of $1,415.60, after crediting the plaintiff with all sums received from him and also with the proceeds of said bonds at their then market value; and this defendant demands judgment against the plaintiff for said sum of $1,415.60, besides the costs of this action.

RICHARD H. HUNTLEY,
Att'y for Defendant.

(*Verification.*) *Reply.*

Supreme Court.

ACALUS L. PALMER *against* ERWIN A. HUSSEY.

CITY AND COUNTY OF NEW YORK:

The plaintiff, Acalus L. Palmer, replies to the answer of the defendant, Erwin A. Hussey, and alleges as follows:

63 First. The plaintiff denies that any corrupt and usurious agreement whatever was made and entered into between him and the defendant contrary to and in violation of the usury laws of the State of New York, and which was intended to be an agreement to pay more than seven per centum per annum, to wit, nine per centum per annum, for the use, loan, and forbearance of money, and which usurious rate the defendant agreed to pay to the plaintiff, and the plaintiff agreed to receive, as set forth in the third paragraph of said answer.

Second. The plaintiff denies that he, through his agent, Stephen W. Palmer, and the defendant had a full and complete settlement and adjustment of their accounts, in which settlement the plaintiff was credited the full value of said bonds, and that thereby it was found that the plaintiff was indebted to the defendant in the sum of $1,415.60, and the plaintiff denies that said Stephen W. Palmer had any authority to make any such settlement; and the plaintiff further denies that the defendant has paid him in full, and does not owe him anything thereon, and he further denies that said defendant has made any settlement whatever on account of said bonds, or paid him any sum whatever on said bonds, as set forth in said fourth paragraph of said answer.

Third. The plaintiff denies that in the month of December, 1867, or at any other time, an account was stated between the plaintiff and the defendant, whereby it was found that the plaintiff was indebted to the defendant for and on account of sums paid, laid out, and expended for the plaintiff in the sum of $1,415.60, after crediting the plaintiff with all sums received from him, and also with the proceeds of said bonds at their market value, as set forth in the fifth paragraph of said answer; and the plaintiff further denies that he owes the defendant any sum whatever for the purchase of merchandise, stocks, and bonds, on any other account or for any other thing.

ARCH. W. SPEIR,
Pl'ff's Att'y.

64 (*Verification.*) *Order of Reference.*

At a speciel term of the supreme court held at the court-house in the city of New York on the 15th day of March, 1872.

Present: Hon. Albert Cardozo, justice.

ACALUS L. PALMER *ag'st* ERWIN A. HUSSEY.

On reading and filing the foregoing consent it is hereby ordered that this action be, and the same is hereby, referred to Hon. Josiah Sutherland, as referee, to hear and determine all the issues herein.

A copy.

CHAS. E. LOEW, *Clerk.*

65 *Order of Reference.*

At a special term of the supreme court of the State of New York held at the court-house in the city of New York on the 20th day of January, 1873.

Present: Hon. Geo. C. Barrett, justice.

ACALUS L. PALMER *ag'st* E. A. HUSSEY.

On reading and filing the annexed consent, and on motion of A. W. Speir, Esq., attorney for the plaintiff, ordered that Francis M. Scott, Esq., counsellor-at-law, be, and he hereby is, substituted as referee in the above-entitled action to hear and determine the same in place and stead of Hon. Josiah Sutherland, former referee herein, and that all evidence and proceedings taken and had before said Josiah Sutherland, as referee, be considered and used by and before said Francis M. Scott, as referee, as if originally had or taken before him.

A copy.

CHAS. E. LOEW, *Clerk.*

66 *Referee's Report.*

New York Supreme Court.

ACALUS L. PALMER *against* ERWIN A. HUSSEY.

CITY AND COUNTY OF NEW YORK, *ss:*

To the supreme court of the State of New York:

In pursuance of an order of this court made in the above-entitled action, and bearing date the 20th day of January, 1873, whereby it was ordered that the undersigned be substituted as refereee in said action to hear and determine the same in the place and stead of Josiah Sutherland, former referee herein, and that all evidence and proceedings taken and had before said Josiah Sutherland, as referee, be considered and used by and before the undersigned as if originally had or taken before him:

I, Francis M. Scott, the referee in said order named, do respectfully report:

That I received from the said former referee his minutes of the

testimony and proceedings taken and had before him, and having heard and duly considered such further testimony as was adduced before me, as well as the arguments of counsel for the plaintiff and defendant, respectively, and having duly considered the same, I find and report as my conclusions of fact:

1. That prior to the 11th day of May, 1866, the plaintiff owned and possessed in the custody of Brown Brothers & Co., his agents, certain United States Government bonds of the respective numbers and denominations set forth in the complaint in this action.

67 2. That on or about the said 11th day of May, 1866, at the request of the defendant, then doing business in the city of New York under the firm name or style of "E. A. Hussey & Co.," the plaintiff transferred to the defendant the possession of the aforesaid bonds, together with one other of like character, which bonds together were of the aggregate par value, as thereupon expressed in print or writing, of nineteen thousand six hundred dollars ($19,600).

3. That said bonds were received by the said defendant in a fiduciary capacity upon the agreement set forth and expressed in a certain receipt in writing therefor given by said defendant to said plaintiff in words and figures following, to wit:

"NEW YORK, *May 11th*, 1866.

"A. L. Palmer, Esq., Dorchester, N. B.

"DEAR SIR: We yesterday received from Messrs. Brown Bros. & Co., on your order, and receipted to them for the same, the following U. S. bonds:

"Ten (10) $7\frac{3}{10}$ U. S. bonds, numbers 62422, 62423, and 62441 to 62448, of $500 each, is	$5,000 00
"One hundred and thirty-two (132) $7\frac{3}{10}$ U. S. bonds, 136,108, 136,109, 136,001 to 136,100, 135,957 to 135,984, 125,153, and 125,154, of $100, is	13,200 00
"Eight (8) $7\frac{3}{10}$ U. S. bonds, numbers 69021 to 69028, $50 each, is	400 00
"One (1) U. S. 6 per cent. 5.20, for $1,000, is	1,000 00
"Total	$19,600 00

68 "The $7\frac{3}{10}$ bonds only were received from Brown Bros. & Co. The 5.20 was held by us as advised, December 23, 1865. These bonds we hold, subject to the order of A. L. Palmer, at ten days' notice, agreeing to collect the coupons for his account, free of charge, and to allow him two per cent. per annum interest on the par value of said bonds, said interest to commence and count June 1st, 1866; interest on the $7\frac{3}{10}$ bonds payable June and December 15th; on 5.20, May and November 1st.

"E. A. HUSSEY & CO."

4. That the said defendant, without the authority, assent, or permission of the plaintiff, fraudulently and wilfully sold, disposed of, and misapplied the aforesaid bonds.

5. That, on or about the 2d day of January, 1868, the plaintiff,

through his agent, S. W. Palmer, demanded of said defendant that he should deliver up or return said bonds, which the said defendant has wholly neglected or refused to do.

6. That, by reason of the aforesaid misapplication of said bonds by said defendant, and his refusal and neglect to return or deliver up the same, the plaintiff has suffered damage to the amount of twenty-nine thousand five hundred and seventy-eight and $\frac{72}{100}$ dollars ($29,578.72), being equal to the market value of said bonds, on the 30th day of November, 1867, with interest thereon from that date to the date of this my report.

Upon the foregoing facts I find and report as my conclusion of law:

That the plaintiff is entitled to a judgment in this action
69 against the defendant for said sum of twenty-nine thousand five hundred and seventy-eight $\frac{72}{100}$ dollars ($29,578.72), besides his costs.

All which is respectfully submitted.

Dated New York, February 27th, 1874.

FRANCIS M. SCOTT, *Referee.*

Additional Findings.

Supreme Court.

ACALUS L. PALMER *against* ERWIN L. HUSSEY.

To the supreme court of the State of New York:

In pursuance and by virtue of an order of this court made in the above-entitled action and bearing *the* date the 17th of March, 1874, whereby it was ordered that the case and report herein be taken off file and sent back to the referee herein, and said referee be ordered and directed to add additional findings on certain questions and requests in said order set forth, and to pass specifically on the same and report to this court with all convenient speed:

I, Francis M. Scott, the referee therein named, do respectfully certify and report the following as my findings in the several questions and requests in said order set forth, in addition to the findings contained in my former report in this action:

First. In respect to the first question or request in said order contained, I find that the contract or agreement made between the
70 plaintiff and defendant, and bearing date the 11th day of May, 1866, and which is set forth and incorporated at length in my said former report, was not usurious and was not therefore void, but was a valid and binding contract.

Second. In respect to the second question or request in said order contained, I find that the defendant did not pay out the proceeds of the United States Government bonds mentioned and referred to in the complaint, or any portion thereof, for two thousand shares of the Perego Gold Mining and Tunnel Company's stock, bought on the plaintiff's order by the defendant as a stock broker.

Third. I find the facts of said last-mentioned transaction to be as follows:

That in or about the month of June, 1867, the defendant requested the plaintiff to send to him an order for the purchase by the defendant in the name of the plaintiff of two thousand shares of the said Perego Gold Mining and Tunnel Company's stock, and stated that if the plaintiff would do so he, the said defendant, would furnish all the money necessary to purchase and hold said stock, and would bear and pay all the loss, if any, arising out of the sale thereof, and would allow the plaintiff one-half of any profit that might accrue therein for the use of his name; that to induce the plaintiff to allow the defendant so to use his name, and as a reason for making such request, the defendant represented to the plaintiff that he, the said defendant, was debarred and prevented from purchasing the said stock in his own name by an agreement with certain parties who were interested in and with whom he, the said defendant, was engaged in manipulating said stock.

That the said plaintiff consented that the said defendant might so use his name in the purchase of said stock, but expressly refused to become the owner or part owner thereof, or responsible in any way for the result of the transaction; and I further find that the said plaintiff never was, nor became the owner or part owner of
71 said stock, but that the defendant was and continued to be the actual owner thereof.

All of which is respectfully submitted.

Dated New York, April 18th, 1874.

FRANCIS M. SCOTT, *Referee.*

Postea.

N. Y. Supreme Court.

A. L. PALMER *ag'st* E. A. HUSSEY.

This action having been duly referred by an order made and entered herein on the 15th day of March, 1872, to the Hon. Josiah Sutherland, as referee herein, to hear and decide all the issues therein;

And a further order having been duly made and entered herein on or about the 20th day of January, 1873, substituting and appointing Francis M. Scott, Esq., referee in the place and stead of the Hon. Josiah Sutherland to hear and determine all the issues herein;

And said referee, Francis M. Scott, Esq., having found that the plaintiff is entitled to judgment against the defendant for the sum [of] $29,578.72, with interest, besides the costs of this action:

Now, on motion of A. W. Speir, plaintiff's attorney, it is hereby adjudged that the plaintiff, Acalus L. Palmer, recover of Erwin A. Hussey, the defendant, the sum of $29,578.72, together with $2,549.85, amounting to $32,128.57.

72 N. Y. Supreme Court.

PALMER *vs.* HUSSEY.

Before Hon. Wm. H. Leonard, referee.

NEW YORK, *January* 10, 1881.

Mr. Huntley offers no testimony.

ACALUS L. PALMER, plaintiff, sworn in his own behalf, testified:

Examined by Mr. SPEIR:

I am the plaintiff in this action; the judgment creditor.

Q. (Defendant's affidavit on motion shown witness.) The defendant in that affidavit, paragraph 3, states certain facts in regard to his receipt of the bonds on that receipt; please state what those facts were.

Objected to on the ground that the contract is in writing and speaks for itself.

Question allowed.

A. The circumstances with reference to the matters mentioned in the two first paragraphs of this section 3, as I understand them, are these: The bonds in question, early in the year 1866, I think, probably as early as January, I had deposited with Brown
73 Bros., bankers, of this city, having purchased them previous to that time, or rather got Mr. Hussey here to purchase them for me, partly with some trust funds that my sister had put into my hands that belonged to the Petigrew estate, the balance with my own money; they were deposited there at that time. I received a communication from Mr. Hussey, who was then acting far me as my agent, and a person in whom I had confidence, although I had never seen him, but from the relations I had had with him I had very great confidence in him, and receiving communications from him by letter, and also through my brother, S. W. Palmer, bringing them to me, stating that I was acting foolishly in paying Brown Bros. commission.

By DEFENDANT'S COUNSEL:

Q. Was that by letter?
A. Yes.

By DEFENDANT'S COUNSEL:

Q. Have you the letter with you?

A. I have not the letter with me. Every single paper I had in the world was burned up in the great fire at St. John in June, 1877, not only at my house but my office. I do not say they are lost, but if they are not lost they are in the hands of the referee. I think the great mass of the letters were left with Judge Speir, or the referee, or whoever was authorized to have possession of them. I say, it being represented to me by Mr. Hussey that I was acting foolishly in paying Brown Brothers commissions, and that he was going into the

banking business himself and had purchased or would have a safe to keep those things in himself, and that instead of having to pay the half per cent. that Brown Brothers charged for collecting the coupons he would do it for nothing, in consequence of that, and in consequence of the business I had had with him and the confidence I had in him from that business and from the representations
74 of my brother, I consented to and did send Mr. Hussey a written order for these bonds upon Brown Brothers, so that he could hold them safely for me as Brown Brothers had.

By PLAINTIFF'S COUNSEL:

There was no liability that Brown Brothers would not be liable for the bonds at all if stolen, lost, or burned up. They were deposited there for me, but they would not take the responsibility against theft or fire, and I suppose they charged me one-half per cent. for collecting the coupons. I then, as I said before, gave Mr. Hussey the right of holding the bonds upon the representation that he had this safe and would do it as well as Brown Brothers. Well, then, having got them some time afterwards—a few days, I presume—Mr. Hussey wrote to me this receipt attached to the complaint, dated the 11th day of May, 1866, the receipt immediately preceding this 3d section, on page 7. That paper I received and retained as a receipt for the bonds, having at that time perfect confidence in Mr. Hussey and not at all thinking that he would——

Defendant's counsel object to the witness stating what he thought or in any way the operations of his own mind not disclosed to the defendant.

The REFEREE: I don't think it would be of any service, but he may state it.

By the REFEREE:

Q. You took that receipt and you held it, and it really describes the terms upon which Mr. Hussey was to receive the bonds?

A. That is not what I proposed to say; what I propose to
75 say is that, having perfect confidence that Mr. Hussey would not make way with those bonds that I dared not make way with myself, I did not take much notice of the matter, except retained it as a receipt for my bonds. (The witness reads from the affidavit of Mr. Hussey these words:) "On receiving the said bonds I used them, as I deemed I had a right to do under the said agreement, and afterwards as I required money I hypothecated them for the purpose of raising the same."

Now, in regard to the first part of that, of course I don't know exactly what he means when he says that he used them as he had a right to, but if he means any more than the right to hold those bonds as my property, and in a fiduciary character, or as a bailee for me, then he had no right to. I never gave him any authority in any way or shape; I would not dare to do it myself even, because it would have been a violation of the law, and he could not have

done it without not only violating the law, but committing a breach of trust, as I understand it. (Witness reads from Mr. Hussey's affidavit:) "And afterwards, as I required money, I hypothecated them for the purpose of raising the same." If this latter part means that the hypothecating was something that he had no right to do under the agreement then it is exactly true.

Q. He sold them in June, 1867?

A. I heard him state that on his oath.

I did not give Mr. Hussey any authorization outside of that receipt to hypothecate or sell those bonds. I want to say in answer to his affidavit that if he means that he deemed by this agreement that he had a right to do that he never informed me of that fact; I was totally ignorant of it, and, although I had proposed to make an agreement to authorize him to hypothecate a portion of the bonds afterwards, he never pretended to me that he had any such right. Some years afterwards I heard him swear he sold them in June, 1867. If so he never informed me of it, and I was not aware
76 that they were in danger or gone in any way until December, 1867, or January, 1868, when some such thing came to my knowledge under the circumstances which I stated in the evidence in the original case on which the judgment was founded. At another time I heard Mr. Hussey state, I think it was in 1870, that a portion of these bonds were lost by the failure of a man by the name of Wham, something like $9,000, although I tried over and over again to find out where the bonds went to, or if he had sold them or not, and, if so, to whom and what they brought. I never was able to do so to this day. He never rendered to me account of having sold these bonds, as making actual sale of them, other than the statement of transfer made in the action.

I was present during the whole of the trial of the original action. I think I tried most of it myself. Judge Spier was my counsel. It was commenced before Justice Sutherland and finished before Mr. Scott, Mr. Sutherland having been elected to the bench in the meantime. Mr. Hussey did not render to me any written account or statement of the alleged sale of the bonds previous to the statement I received from my brother on his return from New York.

Cross-examination by Mr. HUNTLEY:

Prior to giving Mr. Hussey an order for the bonds I had confidence in him four or five years, I think; I might be in error, because the time has been so long that I would not trust my memory. During the time that I was exercising confidence in Mr. Hussey, and prior to receiving from him the paper called copy agreement, commencing on page 6 of the motion papers, I had never seen him. I believe he did. I ordered him to buy these bonds, and sent the fund to do it, and he informed me through the
77 mail that he had done it, and I have no doubt he did; and, further than that, he sent me Brown Brothers' receipt for the bonds—that they held them for me. I knew the reputation of Brown Brothers. I understood it was a perfectly solvent and safe house. I understood they were perfectly responsible for anything they un-

dertook to do. At the time I received what I call the receipt for these bonds, being the paper dated May 11th, 1866, commencing at page 6 of the motion papers, I supposed Mr. Hussey to be a man of little or no means himself, but I knew he had married the daughter of Mr. Southard, whom I understood was a wealthy man—I mean the Mr. Southard who perhaps is known in history as the man who chartered the vessels that carried Banks' expedition to New Orleans. I knew Mr. Hussey had no means of himself, but was a man of good character and one whom I could trust; that was the reputation I understood him to have.

Q. Then you supposed that a man of little means could afford to be personally responsible for $19,600 worth of bonds, so as to make them more safe or as safe in his hands as in the hands of Brown Brothers & Co., to which safety was also attached his liability to pay for those bonds, even though they were lost by fire, theft, or otherwise, and that he could pay you two per cent. per annum for the bonds and collect the coupons free of charge, did you?

A. I don't think that follows from my answer. What I mean is this, that I think if Mr. Hussey was the honest man I thought him to be he would be no more likely to make way with those bonds, or his clerks, than any person with Brown Brothers that was equally honest. If there was any resposibility other than that they would be much more safe in Brown Brothers' hands than they would in Hussey's hands, because Hussey did not have the wealth that Brown Brothers had, and, in that sense, was not so responsible. With reference to what I thought in regard to the payment of the two
78 per cent., the proposition came entirely from Mr. Hussey. I was puzzled in my mind as to what use they could be to him, but the offer came from him and I did not think or care much about it. I have stated what I then thought and what I now think.

Q. Can you give any other answer to the question last put to you?

Objected to. Objection overruled.

A. I can; but such answer would be the same in effect, and I could probably go on and say what I supposed on that subject from time to time down to the present time, because my mind altered.

Q. What induced you to order the bonds from Brown Brothers & Co. into the hands of Hussey?

A. I had these bonds in Brown Brothers' hands under the circumstances that I have mentioned. I thought I was under the obligation to keep them intact and that they would be safe in the hands of Mr. Hussey, and I did not intend to give him the slightest authority to pledge them or sell them, or in any way make way with them, and I believed he could not do so without committing a wrong and a crime, and I did not do so, and so long as I did not give him any such authority I thought it would be a gain to me to have them in his hands, and that I would be complying with his request to me. I have spoken of a safe that Mr. Hussey said he had. I understood that those bonds were to be put in that safe and kept there; and I thought what use he could put them to, and one idea that came into my head was that he might want them for exhibi-

tion, to show that he was entrusted with them, and of course I knew he would have to take them out of the safe at times while under the care of his own eyes. I distinctly understood he was not to use them, but what use he could make of them by exhibition or showing that they were deposited with him, if that was of any use, of course that use was open to him.

79 Q. Did you understand that that was a proper way to prevent the bonds being stolen, to exhibit them and show that they were deposited with him?

A. I understood nothing about it. I knew nothing about the subject of banking at all. What I have been saying is mere conjecture. I never had anything to do with such transactions. What I did understand, and all I cared to understand, was that those identical bonds were to be kept by Mr. Hussey safe for me, and not parted with in any way. The statement about the two per cent. came entirely from Mr. Hussey. I did not know at the time what he was to pay the two per cent. for, nor what he offered to pay it for. I did not know what use they would be to him so deposited. My brother, S. W. Palmer, had seen Mr. Hussey before he received those bonds.

Objected to.

A. I cannot say so from my own knowledge, but I have no doubt he had seen him often. He did often say to me that he had seen Mr. Hussey. S. W. Palmer spoke to me on that subject. My memory of what he said is this, that Mr. Hussey, as he was going away, called him into his back office and asked him if I would not consent to have those bonds deposited with him instead of Brown Brothers; that he was about getting a safe and was going into the banking business, and could keep them just as well and just as safe for me as Brown Brothers, and that if I would do so he would do that and collect the coupons for nothing, and allow me two per cent. per annum so long as I allowed them to remain in his hands.

Q. Did you not substantially accept the proposition of Mr. Hussey reported to you by S. W. Palmer?

A. If the substantial part of it was the keeping of my bonds safe, then I unquestionably did. Whether I said anything about

80 the two per cent. or not I do not remember, because that was a matter of minor importance. Whether that was in my communication or not I am not prepared to say. It might have been and might not.

Q. Did you not write to Mr. Hussey, "My brother, S. W. Palmer, reports to me that you will pay two per cent. for the use of my bonds that are with Brown, Brothers & Co. I want you to take them, and I have in addition thereto $10,000 worth in London, and which I have authorized him to send to you on the same terms?"

A. I cannot recollect the exact terms of the letter or the letters that I wrote to Mr. Hussey, but I am quite sure that I did not write such a letter as that. If words anything like that would be in a letter there would be other words to show Mr. Hussey that these bonds were not to be under his control, so that he would have any right

to sell or pledge them. With reference to the matter about the $1,000 in London, I have not the slightest memory of anything about it all. There was nothing relating to it that I can remember of.

Q. You have stated that Mr. Hussey stated that you were foolish in paying for the collection of the coupons; to whom did you say that?

A. I said that Mr. Hussey had made that representation either by letter or coming through S. W. Palmer, and I could not distinguish which. I do not mean that those are the identical words, but that is the effect of the expression I made before. He never could have said it to me, because I never saw him until the year 1870. I am under the impression he did—he wrote it to me—but I will not say. It came either one way or the other, and perhaps both. If he wrote it, it would be necessarily within the six months before the time he got them. I don't know that I can come any nearer than that. It is so far back that my memory cannot be at all sure, but I should judge it would be in the month of January, 1866, if I am right in the year. When I have the dates I make the response
81 as the result of reasoning, but when I speak with reference to this transaction I speak from memory. I have a memory as distinct and more so than yesterday of some facts.

Q. Do you remember he wrote you to the effect that it was foolish for you to pay Brown Brothers for collecting the coupons?

A. I am sure that was communicated to me from him, either through S. W. Palmer verbally or by writing; I won't say in those words, but in words to my mind having that meaning.

Q. Will you be kind enough to state whether in the fore part of March, 1866, you received a letter from Mr. Hussey in which he says: "I did not intend to convey the idea to your brother that we wanted your bonds. In speaking of Brown Brothers & Co. charging for collecting coupons and not assuming any responsibility, I said many would pay for their use, as it gave them so much more capital in their business, and that we could afford to pay two per cent. a year for their use and collect the coupons free; but *as* I think of going into the banking business, when I could use them to advantage. If I do so, will take them, as it may be the basis of a profitable exchange business. Don't send the London bonds at present, as I have no use for more capital in the present business?"

A. I have no recollection of receiving such a letter, and I know that before my papers were burned up that question was put to me, or a question very like it, with reference to a letter of that date, on the trial of this matter, and I am sure I then stated that I had failed to find any such letter, and I was then satisfied that I had never received any such letter, but of course now, carrying my memory back—if it had not been for that—if you asked me the question now I should have said simply that I had no memory at all on the subject, except that there was a communication. My answer
82 is that before my papers were burned up I made most thorough search for such a letter or something similar; I don't know as it was the very same and failed to find it. The state-

ment I made previously would be more satisfactory than the statement I make now, because I then had the papers.

Q. Do you recollect about the fore part of December, 1867, of receiving a letter from Mr. Hussey, in which he stated to you that he was in trouble and wished you to come on here?

DEFENDANT'S COUNSEL: I object to this.

A. Yes or no will answer the question.

WITNESS: I received a letter, but whether it stated exactly what you say now I cannot tell. In consequence of that letter, sent my brother, S. W. Palmer, here; it was partly in consequence of that letter and partly in consequence of a statement in the letter that Mr. Hussey wanted to secure me, and it was for that purpose I sent him; there was nothing at that time for Mr. Hussey to secure me for except the bonds. Mr. Hussey, in March, 1870, swore that he sold the bonds in June, 1867.

Q. Did you not also hear him during that same examination correct that statement?

A. I do not know what you mean by correcting; he certainly on cross-examination directly contradicted it and showed it was perfectly false, but all the statements stood; they were not corrected.

Q. Did he not on the very next day state that he made a mistake in what he had said the day before, and that he had confounded these bonds with some others?

A. I cannot remember; I know, in regard to some things,
83 that he contradicted himself; he said it was in consequence of a mistake; I recollect of meeting him at the Astor House in 1870.

Q. Did not Mr. Hussey, at that interview at the Astor House, say to you that the transaction about the bonds was in good faith, and what it purported to be?

A. I don't know what you mean; there were several transactions about the bonds. Do you mean the sale of them?

Q. I mean the transaction about the bonds.

A. From beginning to end?

Q. I do not like to say that. I am simply following what you testified to. I am asking you what occurred at the interview at the Astor House spoken of. Did not Mr. Hussey state to you that the transaction about these bonds was in good faith, and that it was what it purported to be?

A. Of course I can't remember now the exact words Mr. Hussey used on that occasion; we had a conversation which lasted, according to my judgment, about two hours, or at all events between one and two hours, and a great deal was said.

Q. Did he not say to you that the transaction about these bonds was in good faith and was what it purported to be?

A. I cannot remember the exact words he used.

Q. Did he in substance say that?

A. I cannot tell what you mean by substance. The conversation lasted for an hour and a half or two hours and he was trying to in-

duce me to withdraw the suit. Such words might apply to some portions of the conversation and not to others. If you ask with reference to any particular portion of it, I probably would be able to tell.

Defendant's counsel moves to strike out all of the last answer, except: "I cannot tell what you mean by substance."

84 The court directs that the portion of the answer enclosed in brackets be stricken out.

Plaintiff excepts.

Q. Did he not state to you in that conversation that he thought he had a right to pledge those bonds, and that he had pledged them; that he had not been able to redeem them; that he had intended to redeem them; that he never intended to cheat you out of the bonds in any way, and that it was simply his inability that prevented his doing it?

A. Such a statement or similar statements have been made to me by Mr. Hussey several times. In February, 1868, I recollect he stated to me that he had not sold the bonds at all until after the settlement with S. W. Palmer. He said during that conversation at the Astor House that he did not claim to sell them under the original arrangement, but he claimed to sell them in consequence of a settlement made with S. W. Palmer, and he had not sold them after that. Therefore I think it would be impossible, although he has made so many contradictory statements, for him to have made that statement in the same conversation; he has contradicted himself so often. What he stated at one time was entirely different from what he stated at another and what he has written. I refer to a letter written under date of February, 1868, in which he distinctly states he did not sell the bonds until after the settlement with S. W. Palmer.

Q. Did he, at that interview, state that he had pledged the bonds?

A. That I can't remember, whether he did or did not.

Q. Did he state that he had not been able to redeem them?

A. I am satisfied he did not say it, because——

85 Q. I don't want the reason.

A. I must give the reason; I am not speaking from memory.

Q. Did he at that interview state that he intended to redeem them?

A. I cannot remember the words that he gave.

Q. Did he state that he never intended to cheat you out of the bonds in any way?

A. I am satisfied he stated that.

Q. Did he also say that it was simply his inability that prevented his redeeming them?

A. I am satisfied he did not say that, if it referred to anything that took place before January, 1868; after that date he may have said it. I was examined as a witness on the trial of the action of A. L. Palmer against Erwin A. Hussey.

Q. Did you not there swear affirmatively to every question that

I have put to you concerning the statements of Mr. Hussey made at the Astor House?

A. I have no memory literally of what I swore to on the trial; neither have I any literal memory of the different times of the conversations, but, of course, at that time the matter was more fresh in my memory than it is now. I am now telling you my memory of transactions at the different times.

Q. Did you not swear that at that same interview at the Astor House Mr. Hussey said that he considered he had a right to pledge the bonds; that he intended to redeem them and get them back, and that he did not do it simply because he could not?

A. I may have sworn to that with reference to what took place after the settlement between him and Mr. Palmer.

Q. Did you not swear that he stated that to you at the Astor House?

A. I cannot tell whether I swore to it or not—whether these are the words; I apprehend I could swear to that with reference to one state of facts.

86 Q. All the state of facts I am asking about is the bonds.

A. There would be a different statement before a certain date and after a certain date.

Q. Did not Mr. Hussey, on the trial of the action, swear that at the time he wrote you the letter—in or about the fore part of December, 1867—the bonds were not gone at that time?

A. I cannot remember what he swore to on that subject.

Q. Did he not swear that the bonds were pledged at that time?

A. That I can't tell.

Q. Did you not ask him if he did not say to your brother that the bonds were pledged before he (your brother) came on?

A. I do not remember.

Q. With reference to your statement that Mr. Hussey swore that he had lost the bonds in June, 1867, did you not at that same examination and on the day following the statement of Mr. Hussey to which you refer say: "You told me you had lost some of the bonds in April, I think, by Whann," to which did he not reply, "No, sir. * * * That I find by referring to my books since I was here yesterday," and then did not Mr. Hussey correct his statement as to the time?

A. I do not think you are correct when you say I said he had lost the bonds; I think I said he swore he had sold the bonds in June, 1867; my statement was made with reference to his being examined in 1870 before the referee, and, while I cannot remember all that was said afterwards on that occasion, I cannot think that he referred to his books, because my memory of that is that it all occurred in one day.

Q. I am not asking you whether he referred to his books, but whether he did not say he had referred to them.

A. Of course, I cannot remember, and it may be as you say.

87 Q. I am reading from the official stenographer's minutes.

A. There was no official stenographer there.

Q. I am speaking of the trial.

A. I am referring to an examination before trial.

Q. On the trial of this action did you not put this question to Mr. Hussey: "Could those bonds at that time" (referring to the time when your brother was here in December, 1867) "have been obtained by you by the payment of the loans upon which the bonds were pledged as collaterals?"

A. I have no memory of such a question, but I may have put such a question.

Q. Did he not answer to that question, "Yes, sir?"

A. Well, I have no memory; quite likely.

Q. You said yesterday that you would not dare to make way with these bonds yourself, and it appears from your own testimony that you hired them to Mr. Hussey at two per cent. per annum. How do you reconcile your statements?

A. Well, I can do so by stating what my view of my position was at the time. My sister had some trust funds in her hands that she trusted me with to make the best I could. The law, as I understand it, in regard to that is this: That there was nothing in which I could put the trust funds that differs from by own funds; all a person has got to do is to use them as he would his own and not convert them without the leave of the *cestui que trust*, if competent, or by leave of the court if incompetent, but he is at liberty to put them into anything that a prudent man would put his own into, or to deposit them in any such way, and therefore I was careful when Mr. Hussey induced me to remove the depository from Brown Brothers to himself not to convert them myself or to authorize anybody else to convert them. That was the only thing I thought I had to look out for. What he gave me I thought was a matter for his consideration; whether any benefit he could get under
88 the contract or arrangement, whatever it was, was such as would be worth the money he was to pay for it I did not think I had anything to do with. All my business was, I thought, to see, and I did not authorize him to convert them, and I thought I had not done it in any way, and I have not a shadow of doubt that Mr. Hussey thought so also. I told him the circumstances under which the bonds could be pledged, or a portion of them, and otherwise they could not be, and therefore I theught I had complied with the law, and if I had done more I would be liable, according to my judgment, certainly, to answer for the matter, and I think, criminally. Now, that is what I mean. Then, with reference to the hiring, that was nothing in the world more than allowing them to be deposited with him, and for this I thought he chose to pay me two per cent. I did not understand at all what he could use them for, but I thought that was his business, and when Mr. S. W. Palmer came back I discussed it with him and told him I could not see what could be done, and I thought possibly there might be some fraud and it might be that Hussey was not reliable and he might take this plan to get them into his hands and make way with them. In answer to that S. W. Palmer said there could not be anything of the kind, for he had known him for a long time, and I might rely upon him, and he would not dare to make way

with the bonds in any way, and there might be some way in which the bonds would be useful to him. He told me he did not think he was a man that had any property of any consequence, but he was well connected, and when the public began to see that he was a good business man and an honest man that he had not any doubt he would do well if he got credit and did not himself speculate, and he had understood from him that he did not intend to do so, but simply to do a commission business. This conversation between
89 me and S. W. Palmer took place when he came on; it was in the year 1866, previous, at all events, to April, and before Hussey had the bonds; it might have been in December, 1865; it is quite possible.

Q. What is your age?

A. I am 60, going on 61. I entered the profession of the law; now I am a judge of the supreme court of my native province. I was a practicing lawyer for a great number of years—perhaps the longest of any one in our province. I commenced in 1844, and consequently have been familiar with the laws from that time to this. I think, probably, I have been the hardest-worked man—certainly in our province if not in Canada.

Q. Now, will you state, as a lawyer as well as a witness, how your permitting Mr. Hussey to take the bonds under the terms of the paper, on pages 6 and 7 of the motion papers, was not a conversion, and how his using them in the manner which you understand he did use them was a conversion?

A. I have stated already that Mr. Hussey was to take the bonds and have them deposited, and keep them safely for me, as far as that went, the same as Brown Brothers had them; that I had sent him an order for them, and he had actually got them into his hands before he sent me that receipt. When he sent me that receipt I thought he sent it as a statement of the understanding on which he took them. I read it and understood it as meaning exactly what I meant, and that was not to authorize him to sell or pledge or do anything with the bonds, except what was consistent with keeping them intact for me. I was careful about that part of it, and if the paper has any other meaning than that then I misunderstood it. I do not think it has. I understand that the court of appeals here have decided that it has not; that it has exactly the meaning I attributed to it, and you understood that this was just a representation that was made, and in which I had no part, except that
90 I kept it, believing it to be an exact representation, and I now believe it to be an exact representation of how they were deposited. Now, then, I have explained my view of the law. That being so, I was doing simply what was within the law; that would be no conversion whatever. I did not intend to convert the bonds or authorize anybody else to convert them. Of course, I could not prevent the embezzlement of them by Brown Brothers or their clerks, or Mr. Hussey, if he was bad enough to do it, and therefore I have not the shadow of a doubt, in point of law, that unless the paper did authorize him to sell or pledge the bonds there would be no conversion, and the law would be certainly with us that if

Mr. Hussey did it would be clearly a breach of trust, and if he did it feloniously it would be embezzlement equal to larceny with us, and I thought I was perfectly safe; that neither Brown Brothers nor Mr. Hussey would attempt that; at all events, I think, that would be no conversion by me.

Q. You have said that you repeatedly told Mr. Hussey the circumstances under which he could pledge the bonds. Suppose he had pledged them under such circumstances, would that have been a conversion on your part?

A. You have not accurately stated what I said; what I said was that I represented to Mr. Hussey the terms on which I was willing he should pledge the bonds—that is, if certain things took place, but I took care that those things did not take place; therefore I took care that he never had, and I never intended he should have——

Q. Did you say this to him?

A. Not the words, but, for instance, I would draw a bill, say, for $5,000, and I would tell him the gold would be sent in ten days to meet it.

By PLAINTIFF'S COUNSEL:

Q. Was not that a proposition made before this whole transaction took place?

91 A. No; afterwards I repeatedly wrote to him; perhaps I would draw a bill or tell him to pay a certain sum of money at a certain time, and at a certain other time the money would be forthcoming, perhaps $5,000; never a larger amount than the bonds of my own, and I would write to him and say: "In case the money does not come you are perfectly safe to accept the bill, because in that case you can pledge the bonds to raise the money or sell my bonds—sell sufficient bonds to cover that amount;" but I always took care that the money was there, so it was a conditional authority which was never made effective.

By DEFENDANT'S COUNSEL:

Q. As a lawyer and a judge of the supreme court, and a gentleman of your experience, have you now given the best answer you can to my last two questions?

A. I may possibly make a better answer, but I thought I made as good an answer as occurred to me at the time.

Q. If Mr. Hussey was not to have the right to use those bonds, why was he to have ten days' notice to return them?

A. I never heard of ten days, that I remember of, until it was mentioned in some of Hussey's letters, or I received the receipt, and when I saw the ten days I did not think it was at all unreasonable, because I really could not tell whether he could have it in such a way that he could get at these bonds in a short time. I did not think the ten days was of any consequence one way or the other. I did not object to it; it was not discussed.

Q. You wrote to him about the ten days?

A. Well, *you* if you produce the letter.

PLAINTIFF'S COUNSEL: The proposition came from Mr. Hussey originally that he would pay so much.

92 DEFENDANT'S COUNSEL: When this case was being prepared I had the letter and know that you (plaintiff) wrote it.

WITNESS: It would require more than the statement of somebody to make me believe I did write it. It is possible I did. Either Mr. Hussey's memory or mine is at fault. I heard that the bonds were in danger in December, 1867, or January, 1868, by a communication from Mr. Hussey—either a letter or a telegram

Q. I wish to call your attention to the remark of Mr. Hussey's about the safe. Was not that remark made in conversation with the purchase of a $1,000 5.20 bond, which never went to Brown Brothers at all?

A. It was made with reference to——

Q. I would like to have you say yes or no.

A. I cannot say yes or no.

Question repeated.

A. The remark applied to all the securities; but of these securities that are mentioned in that receipt one of the bonds was never in the hands of Brown Brothers, and perhaps I should have said that before, and, therefore, so far as that formed a portion of the whole of these it would apply.

Q. At the time of that remark had one word ever been said or written between you and Mr. Hussey as to his taking their bonds or any portion of them?

A. I have already said that Mr. Hussey had not spoken to me at all. All the communication I had from Mr. Hussey was through S. W. Palmer and his writing, and if Mr. Huntley means that it was before either S. W. Palmer brought it from Hussey or Mr. Hussey wrote it.

Q. I ask you if at the time the remark was made about Mr.
93 Hussey's safe, as you testified yesterday, one word had been said by you, or by your authority, to Mr. Hussey, or one word had been said or written by him to you about his taking those bonds, or any portion of them?

A. I think not; I think it was said in the first communication that he wanted me to give them to him, and this was one of the inducements, that he had this safe to keep them in. I think that preceded all others.

Q. Did not Mr. Hussey write you, under date of December 23, 1865, "We have deposited those bonds in our fire and burglar proof safe, subject to your order and until we hear from you. If you then direct we will deposit with Brown Brothers & Co.?"

A. I have no distinct memory, but I have an indistinct memory of that statement being made to me at the time this bond was purchased.

Q. Was there any time, other than the one I have just referred to, in which Mr. Hussey in any way referred to a safe?

A. Yes, as I have already said, that either in the letter in which he referred to getting these bonds, or S. W. Palmer came back to me

and told me that Mr. Hussey told him he had this safe and could keep them just as safe as Brown Brothers. That is where I understood these were to be deposited. Whether it was in a letter or whether S. W. Palmer brought it to me I am not able to state. I cannot say positively that I have ever seen any other letter from Mr. Hussey that contained any reference to a safe than the one you have just read to me an extract from (handing paper to witness), and he says, Yes, that is my signature.

Mr. HUNTLEY: I read the paper to which the witness states that the name attached is his signature:

94 DORCHESTER, *March* 23, 1866.

GENTLEMEN: I am in receipt of your several favors, and I am glad to find that you have sent the books. I now enclose an order for the U. S. Treasury notes on Brown Brothers & Co., which you can hold securely for me and collect the interest, you to allow me two per cent. on par value and collect commission free of charge, to be held by you for me and returned to me at any time upon ten days' notice. The amount that you will hold on these terms will be—

U. S. Treasury notes	$18,600
5.20 bonds	1,000
	$19,600

I have directed S. W. Palmer to send you out some part—say 4 or 5,000—of the 5.20 bonds that I have in London, so as to make about $25,000 in all. Please to send me receipt for them, expressing the terms on which they are held, so that I may have it among my papers, as life is not secure. I notice what you say about Burnham & Sons and it shall have my attention.

I am yours, &c., A. L. PALMER.

E. A. Hussey & Co.

A. I referred to several letters in which Mr. Hussey had made propositions to me, either in all or one of them—the dates I cannot tell—you understand me, I have no memory of the receipts of the letters, but seeing these here I have no doubt at all I must have received several letters, as I have stated before, and either one or all of those contained the terms that are here proposed to me, or referred to S. W. Palmer, one or the other, and then I took from — his proposition, put it down here, and requested him to carry it out,
95 just as this is; I have no memory of the receipt of the letters, except generally that I received several letters from him at the time.

Q. Did you, by due course of mail, receive from Mr. Hussey a letter dated March 7, 1866, addressed to A. L. Palmer, Dorchester, N. B., in which he states: "We will take your bonds, allow two per cent interest, par value, collect coupons, invest or remit free of charge on demand of same, to be subject to ten days' notice. Should they be used as collateral, or any portion of them, for your account,

of course interest will cease while so used. Send us orders for them and we will allow you interest from the date they are drawn from Brown Brothers, of which you shall be duly advised?"

A. I cannot state on the subject of the receipt of the letters more than I have; as I said before, the letters I received——

Q. I object to your answering any further; that is an answer; will you say that the letter from which I have just read is not one of those referred to in your letter to Mr. Hussey of March 23, 1866, in which you say, "I am in receipt of your several favors?" Your letter is March 23d?

A. Well, I cannot tell, speaking from memory, as to the date. I will not say that such passages may not be in a letter that I received bearing that date. (Looks at letter of March 23d, 1866.) It refreshes my memory in this way, that I had proposed to send with these other four or five thousand dollars of the 5.20 bonds which I had in London, and from the conversation that took place between Mr. Stephen Palmer and me I was under the impression that Hussey wanted it made up to about $25,000. Do not understand me as saying I have a memory of it; I have not. It must have been so from the statement.

Q. Then when you said yesterday that you were confident that you said nothing about the London bonds in any letter you were mistaken, were you?

96 A. I am under the impression that you are mistaken and that I did not make the statement in that way; that I never said anything about the London bonds.

Q. Bonds in London?

A. Well, bonds in London; I think you will find the statement I made was some particular statement as to some $10,000 of bonds. I have no recollection of receiving from Mr. Hussey, by due course of mail, a letter directed to me, and dated March 4, 1866, in which he says, "Don't send the London bonds at present, as I have no use for more capital in the present business." I have no recollection of it. I have no recollection of receiving that statement in any letter from Mr. Hussey; it is not a thing that I bear in mind; if you do not want to go any further, I cannot answer you as to the probabilities of it; my mind does not dwell upon it; I cannot answer after these years without my memory is refreshed by the letter.

Redirect by Mr. SPEIR:

I had those bonds in London; would have deposited those bonds with Mr. Hussey; had sufficient confidence in him to have deposited those bonds with — at that time; I had, Mr. Hussey making, together with what he had, to the amount of $25,000; that is, adding to what was here enough of the London bonds to make $25,000; my memory disagrees with Mr. Huntley's, and I want to see just who is right and who is wrong.

Mr. Speir refers to the first day's examination.

WITNESS: And while Mr. Speir looks for that, let me see that letter read by Mr. Huntley. (Letter of March 23d, 1866, handed wit-

ness.) All I want to say is that this letter now produced by
97 Mr. Huntley with the expression in it, "which you can hold securely for me," is a portion of the correspondence that I referred to in my deposition on the first day of this examination, when I said that it was distinctly understood that he was to hold them securely, the same as Brown Brothers.

Mr. HUNTLEY: I object to the arguments and inferences of the witness. What he states is a deduction from his view of the correspondence.

Mr. Speir calls the attention of the witness to the examination he is asked in regard to at pages 20 and 21.

WITNESS: I see by reference to this that Mr. Huntley was mistaken.

Mr. SPEIR: I call for the production of all the original exhibits put in evidence by the defendant on the trial, and copies of them if they have not the exhibits in their possession, and all other exhibits that they may have or may have been used on that trial, and all the letters and papers referred to on the taking of the depositions on this motion, and I will put in evidence myself on the part of the plaintiff the exhibits put in by the plaintiff on the trial in this action, or copies of the same if the exhibits are not in existence, and a copy of the stenographer's report of the testimony of the witnesses on the trial of the action.

Mr. Huntley, defendant's counsel objects on the ground that they are not pertinent to the subject of the inquiry ordered by this reference.

98 The papers were not produced or read at this point.

Mr. SPEIR: I desire to make the objection formally to the examination of the witness by Mr. Huntley as to any and all facts that were not strictly part of a cross-examination as to the evidence offered by him in rebuttal of the facts stated in section three of the defendant's affidavit on the motion.

Mr. HUNTLEY: Have you any other witness?

Mr. SPEIR: No; no other witness.

A. S. PALMER.

ERWIN A. HUSSEY, called as a witness on his own behalf, and being duly sworn, testified:

Examined by Mr. HUNTLEY:

I am the defendant in this action; I am 48 years old; my business in early life was a seaman; abandoned the sea in 1861 or 1862; I have never been a lawyer or a supreme court judge; I first made the acquaintance of Mr. Palmer, the plaintiff, I should think, perhaps, in 1862 or 1863.

Q. What led to your receiving the bonds inquestion from Mr. mPealr?

A. I will state it just as short as I can, if you will allow me, the whole history of them.

(Referring to book.) On May 5th, 1865.

Mr. SPIER: Are you reading a statement?

WITNESS: I am referring to dates.

99 Mr. SPIER: I object to the witness stating any other facts than he has stated in his affidavit in the moving papers, or in reply to the testimony of the plaintiff on this hearing before the referee.

The REFEREE: I propose to take the testimony of the facts and circumstances offered by the parties.

A. On May 5, 1865, we bought $18,600 of the bonds in question for Mr. Palmer, the plaintiff, and deposited them with Brown Brothers & Co., taking their receipt for them, which we forwarded to Mr. Palmer on May 6th, 1865. Later we received a letter from Brown Brothers & Co. stating that they would not be responsible for the bonds if stolen or burned, and that they would charge one-half per cent. for collecting coupons. We forwarded that letter to Mr. Palmer, writing him if he chose he could send Brown Brothers' receipt, and we would procure the bonds and send them to him.

Mr. SPIER: I object to his telling the contents of the letter.

The REFEREE: I have stated that I will take any testimony offered as to the facts and circumstances.

Mr. SPIER: I think it would be much better to have these letters produced and put in evidence.

The REFEREE: I cannot control him as to his mode of proceeding.

100 WITNESS: Some days later we wrote Mr. Palmer that we had seen Brown Brothers & Co.; tried to persuade them to collect the coupons free, as they had received full commission for the purchase of the bonds, having bought them through Brown Brothers & Co., which they declined to do, they stating that Mr. Palmer had written them that he would come on himself shortly——

Mr. SPIER: I object to that.

WITNESS: And that the bonds would be perfectly safe in Brown Brothers' hands, as they would take good care of them, and he could make any arrangement he saw fit when he came on. We afterwards bought a $1,000 5.20 bond for Mr. Palmer, of which we advised him that we had deposited it in our fire and burglar proof safe, and as Brown Brothers charged a half per cent. for collecting coupons, we would collect them free; that the bond was in our safe subject to his order, and if he so directed we would deposit the bond with Brown Brothers & Co. Later Mr. S. W. Palmer, Mr. A. L. Palmer's brother, came to New York, and in conversation with him about the bonds I stated that many people would pay for the use of them, as it gave them so much more capital in their business; that I thought of going into the banking business, and if I did I could pay two per cent. for the use of them myself. Some time after Mr. S. W. Palmer left for home, and I received a letter from Mr. A. L. Palmer stating: "My brother left for Europe yesterday. He informs me you can afford to pay two per cent. for my bonds and collect the coupons free. If so, you can have them. I have directed him to send out to you $10,000 5.20 bonds

which I have in London. Please write me if he, S. W.
101 Palmer understood you." I got that letter in the morning in my office before any one else came to the office, and I felt so anxious that Mr. Palmor should not send the London bonds that I sat down immediately and answered the letter myself, in which I said Mr. S. W. Palmer had misunderstood me; that I did not intend to convey the idea that we wanted the bonds, but as I thought of going into the banking business; if I did I would take them and pay two per cent. for the use and collect the coupons free, but not to send the London bonds, as we had no need of any more capital in our present business. I put that letter in an envelope, put a six-cent postage stamp on it, a Nova Scotia postage stamp, and as soon as the clerk came in I sent him immediately to the post office with it, and when he returned, in my anxiety to know that the letter was mailed so that it might get there in time to get news to Europe by the first steamer not to send those bonds, I asked the clerk if he mailed the letter, and he told me he had. I afterwards told Mr. Palmer, on March 7th, 1866, stating that we would take his bonds, pay two per cent., collect coupons free, same to be subject to his order at ten days' notice; that we would take the bonds the 1st of May, or shortly after, interest to commence when we drew them from Brown Brothers & Co. I also stated in that letter that when they were held as collateral for his account we would pay no interest for them—on the portion of them that they were held as collateral for his account. He acknowledged that letter on March 17th, stating: "I am in receipt of your letter of March 7th, and will send the order for the securities as soon as I can lay my hand on Brown & Co.'s receipt." We received a letter from him to that, dated March 23d, enclosing Brown Brothers' receipt for these bonds, which we acknowledged, stating we would take the bonds when we commenced the banking business or shortly after. We did take
102 the bonds on the 11th day of May, 1866. My partner, Captain Cobb, wrote in a letter the description of the bonds—I mean the receipt for the bonds set out in the complaint on pages 6 and 7 of the moving papers. I will state here that I have never read that letter or receipt; never knew of its existence until after Captain Cobb's death, when this suit was brought. I then used the bonds from that time during the whole three years, more or less, that I had them as collateral for the purpose of borrowing money. Where I have said "we" I mean E. A. Hussey, Jacob A. Cobb, and Henry W. Ladd, who formed the firm of E. A. Hussey & Co. at the time. Mr. Cobb is dead and Mr. Ladd is dead. They were both dead before this suit was brought. Although I made large losses during the time that I held those bonds, I was solvent and amply able to protect them at any and all times up to December, 1867. I lost in the summer of 1867, through the failure of William Whann & Co., between thirty and forty thousand dollars. I had deposited with them $25,000 of Government bonds, all of which I lost. For a long time I was under the impression that a part of these bonds that I deposited with Whann belonged to Mr. Palmer, and I so testified once in this suit, but the same night, I think, that I testified in

this suit, in looking over my books I found that none of the bonds lost by the failure of Whann belonged to Mr. Palmer, and corrected my testimony, I think, the day following to that effect. In December, the first part of December, 1867, I became embarrassed in business and wrote Mr. Palmer to that effect immediately, on December 10th, asking him to come on or send some one on with power to settle. At that time the bonds were hypothecated. I did not hear anything from Mr. Palmer, and again wrote him on December 19th to the same effect. Shortly after that Mr. S. W. Palmer, his brother, came on with a letter from Mr. A. L. Palmer, stating that he was sorry for my misfortunes and that he could not come himself,
103 but he sent S. W. Palmer, who would do all he could and settle with me. I told Mr. S. W. Palmer how I was situated. I told him I had a judgment note for $20,000 coming due with Mr. Butterfield, on which was held collateral security that had cost me over $125,000; that I was trying all I could to pull through; that if his brother would take up this note with Butterfield I would have my wife exchange her house for a building in Broadway, which was fetching in an income of $15,000 a year, give him that for security, and that my wife would give him everything that she had for security, and if he would assist me I thought that I could get through without failing. Mr. Palmer returned home, stating that he would consult with his brother and write, or his brother would write, immediately. He left here on the 2d day of January, 1868; I anxiously waited until near the middle of January, received no letter from either of them, and Mr. Henderson having procured a judgment against me for sixty or seventy thousand dollars, I could hold out no longer; the bonds had to be sold to pay the loan. They were sold to pay it; yes, sir. I will state further that after Mr. S. W. Palmer left my wife did sell her house and gave up all property in her hands which could be converted in any way to help me to save my failure if possible. I have spoken of the losses by Whann & Co.; there were other losses than those to which I was subjected during the time I held the bonds to a large amount. I lost $250,000 by the failure of Oddie, St. George & Co.; I made other losses; I was present yesterday when you read to the plaintiff certain questions from the official stenographer's report of the trial of this case before Mr. Scott; I have not the slightest doubt of their correctness; I did state to Mr. Palmer, at the Astor House, that all my transactions with those bonds had been in good faith; that was the fact; I never at any time intended to defraud Mr. Palmer out of those bonds or their
104 value; I did sincerely believe, from the circumstances under which I took the bonds, that I had a right to use them and to hypothecate them.

Q. Will you state, as a business man, any way in which you could have used those bonds so that they would have been of any service to you whatever, except by hypothecation?

A. There is no possible way that I could have used them except to borrow money on, and I could not pay $400 a year for any other purpose for those bonds. I never said anything about a burglar and fire proof safe other than what I stated in my letter I have spoken

of, which contains the announcement of the purchase of the $1,000 5.20 bond, and I only mentioned it then because we had just bought the safe, and I suppose Mr. Palmer did not know that we had a safe. There never was at any time any reference made to the safe in connection with the bonds taken from Brown Brothers & Co. I have only one original of the letters referred to in the testimony I have now given, and that is the one which has been read to the stenographer and taken down, the one dated March 23d, 1866, and which has been read in evidence. I have looked for the others. I have at some time taken copies of them, and I have refreshed my recollection by an examination of those copies. I know that those letters, both Mr. Palmer's and mine, were very hard to read. Mr. Palmer, though a very rapid writer, I should judge, is a very indistinct one. I myself am a very poor writer and a very indistinct one. We found it very difficult to read either his letters or mine—what I wrote myself, so we had them copied, and I think these copies were given to the referee, and my impression is that they were all marked by the stenographer and acknowledged to be copies of the same letters; therefore, I believe these copies to be true copies of the originals.

105 Q. That is not quite my question. My question is whether the testimony you have given is correct so far as it relates to the contents of those papers?

A. In the main they are correct; I don't know of any error; the idea is, I might use some words that are not in the letters, but substantially they are correct; I made, as near as I could, correct copies, and I believe I have correctly stated it; — not make them myself, but I had them made, and don't know that I can swear that I compared them all personally; the letters that I wrote I could read; they are correct copies—all of them—of the letters I wrote; there are some letters of Mr. Palmer's that could not be put in evidence, because they could not be read—could not find anybody to read them.

Cross-examined by Mr. PALMER:

[A.] I say some of your letters could not be put in evidence because nobody could read them.

Q. Don't you think Mr. Palmer himself could have read them if they had been put in? and yet you have sworn that you made true copies of them.

A. No.

Q. And yet you have sworn they were copies?

A. I have avoided swearing positively to that, because I can't swear to what other people do.

Q. Then you don't swear they are copies?

A. My testimony shows.

Q. Do you or not swear they were copies?

A. Are you cross-questioning me now?

Q. I am.

A. I would swear, to the best of my knowledge and belief, that they are copies.

Q. Will you swear that they are copies?

A. That is all the answer I can give.

Q. Well, then, you have just said that they were so badly written that they could not be put in evidence?

106 A. I said some.

Q. I presume you mean that those that were so badly written, as you have spoken of, could not be put in evidence; is that so?

A. My remembrance is that there were two letters that we could not decipher; that there were some of those letters that were so badly written they could not be put in evidence.

Q. Have you copies of those letters?

A. What letters?

Q. Don't you know, sir, what I mean?

A. No, sir.

Q. I mean of the letters that you say could not be put in evidence.

A. How could I have copies of them if I swear I could not read them?

Q. Have you got copies of them or not?

A. No, sir.

Q. Then those are not included in the copies you have; the copies that you spoke of, as I understand you, you produced to the referee in the original action?

A. Yes, sir.

Q. Have you seen them since?

A. No, sir.

Q. Then from that time down to the present time you have not seen those copies—from the time of the trial I mean?

A. Yes, sir; I have seen them.

Q. I understand you to say you gave them to the referee and that you had not got them back.

A. I did not say so, sir.

Q. Had you got them back?

A. I got some of them back.

Q. Did you get them all back that you have been testifying about?

A. All that I have been testifying about? Yes, sir.

Q. Then you have them now?

A. Yes, sir.

Q. You have them still?

107 A. Yes, sir; those that I have testified about. I don't know how many letters that I received from the plaintiff that I have not testified about. I presume that I have not testified about all that I wrote. I have not copies of all the letters that I wrote. I do not remember the contents of all the letters I wrote.

Q. Now, you said that when you first testified about this matter you were under the impression that a portion of the plaintiff's bonds were lost in the hands of Whann & Co., and that you afterwards discovered that you were mistaken about that. Will you be kind enough to tell me when you found out your mistake?

A. I think it was the same night that I testified they were lost

that I was examining my books; I can't give you the date; recollect testifying in the court-house in this city in March, 1870; I do not recollect testifying on that occasion first of all that I had sold the plaintiff's bonds in June, 1867; I would not swear positively; I don't think I did; if I did swear to that it would not be true.

Q. Suppose you did make such a statement, it could have no other origin in the world than a pure fabrication, could it?

A. It could in no case be a pure fabrication, because if I did so state I was stating what I honestly believed at that time. I know of no fact that could have made me so testify, that the bonds were sold, but I might have testified that the bonds were lost through Whann & Co., as I was under that impression for a long time myself, that they were lost. I know of no fact that would induce me or cause me to testify that they were sold.

Q. Was not that statement made in order to bolster up an attempted charge against me that you had disposed of the proceeds of the bonds in buying in June, 1867, an amount of bogus Perego stock?

A. No, sir; I think I stated that money was borrowed on those bonds for that purpose.

108 Q. The question I put to you is whether you never stated that the proceeds of the sale of those bonds you had applied in buying some stock—I think Perego Mining and Tunneling Company—for me?

A. I don't think I ever did, but I can't remember whether I did or not; I will not venture to swear that I did not.

Q. Did you ever state that you were perfectly able to have redeemed the bonds up to the time that you had settled with S. W. Palmer for the proceeds of them, and that you claimed the right to retain the proceeds of the bonds because you had purchased this stock for me?

A. I don't remember whether I did or not.

Q. May you not have said that?

A. I don't think I did.

Q. Did you never claim the right to dispose of these bonds because you had expended the amount of them in buying such stock for me?

A. I don't know whether I ever did or not; I did claim that I did not owe you for the proceeds of those bonds because I had settled with S. W. Palmer and credited you with the amount; I will say that that claim was made upon a basis of a settlement made with your brother when you were charged with this stock and you were credited with the bonds at the market price of the day; I think that is all.

Q. Was not the settlement that you speak of sworn by you to have been made by you with S. W. Palmer when he was on here in December, 1867, or January, 1868?

A. It might have been, for I always thought that I made a settlement with him.

Q. Have you not represented to S. W. Palmer that the proceeds of these bonds had gone to pay for this Perego stock?

A. I did not.

Q. Did you state to him, or did you swear in the course of your examination in this suit, that you paid on the 27th day of
109 June or 26th day of June, 1867, some $20,000 for Perego stock that you had bought for me on that day?

A. I don't know whether I swore to it or not; I did pay that on some day in June for Perego stock that I had bought for you—I think the 26th or 27th of June—I don't remember; it might have been a few days one way or the other; at all events at the time I was examined on this trial my memory *the* would be from the account rendered, and my books was all that I had from my memory.

Q. You spoke of a conversation that you had with me at the Astor House; do you recollect whether you said anything to me on that occasion about this Perego stock?

A. No, I don't remember; I will not swear whether you did or did not.

Q. Will you explain how it is that you could remember what you said to me on that occasion when Mr. Huntley asked you and you cannot remember any more?

A. Because I have refreshed myself from the copies of the letters—refreshed my memory from the copies of the letters.

Q. Will you be kind enough to explain now how any copy of any letter could explain what took place in any conversation between you and I at the Astor House?

A. Have I said anything in my testimony here about any conversation with you at the Astor House?

Q. Do you think you have not said anything in your testimony about a conversation with me at the Astor House?

A. I do think I have not.

Q. You think you have never mentioned anything about it?

A. This testimony taken before the judge?

Q. Yes.

A. No, sir.

Q. Have you got a good memory?

A. No; I have not a good memory.

110 Q. And yet your memory is so good that instead of bringing your letters here you undertake to swear to a long correspondence between you and I fifteen years ago?

A. No; I have copies of the letters here.

Q. And is it from that?

A. It is from that that I take my dates, statistics and everything.

Q. If you have sworn during this examination that you told me at the Astor House that you acted honestly in reference to this matter—or words to that effect—that has been entirely the creature of your imagination?

A. I recollect now that I have so testified when you call the matter to my recollection.

Q. Now, as you remember that, can't you draw a little further and tell us whether you remember that anything was said in that conversation about the Perego stock?

A. I can't, because in my testimony I had refreshed my memory

from the official minutes of the trial; that is why I remembered what I testified to about the conversation with you at the Astor House.

Q. Before, when I asked you about [the] conversation at the Astor House, you said the reason you recollected was you had refreshed your memory by letters.

A. Well, if I said so I did not say what was the fact, because I refreshed it from the testimony given on the trial. I will now state that I have refreshed my memory from the testimony on the trial and from the letters I have been able to find.

Q. The fact is that your statements, when you come to make them, your memory is so bad or some other defect in it, that every time you come to tell this story you tell it different, don't you?

A. I don't mean to.

Q. I know you don't, but you unfortunately do get it different and terribly different.

A. Well, I don't know that I do.

111 Q. Well, we will try it again. Do you recollect whether this took place, whether I said to you on that occasion at the Astor House, notwithstanding what you said, that I was thoroughly satisfied that this old story about your buying Perego stock for me in June, 1867, and applying the proceeds of my bonds, was a simple swindle, and if you could show me or take me to one single man that you had paid one single cent to in cash for Perego stock that I would repay it to you; now, don't you recollect my saying that?

A. I remember of your testifying you said that on the trial.

Q. Will you answer me whether I said that to you or not?

A. I can't remember whether you said that, but you did say something of that kind. Your memory and mine of the Astor House interview differs very much. I contended that our interview did not last fifteen minutes, and you testified that it lasted from one to two hours. I think there was a very little said at the Astor House. So far as I can remember you made something the same remark that you made now, and I got offended at it and left you immediately. That is as far as my memory goes. If you call my attention to things whereby I can bring my mind on it I will give you the best answer I can.

Q. You say now that you testified that that interview lasted fifteen minutes?

A. I don't say that I testified so; I say my impression is that the interview was not over fifteen minutes; I don't know whether I testified on the trial about it or not.

Q. The referee found you had made away with these things fraudulently?

A. I don't know anything about it; I know Mr. Huntley told me the decision was against us, and I had no money to appeal it.

112 Q. You don't know that he found that, or what he found it on?

A. No, I don't know what he found it on.

Q. Did you or not tell me on that occasion that you did not pretend that you had any right to sell my bonds for the purpose of pay-

ing for this Perego stock, but that you claimed that S. W. Palmer had settled the account and assumed them?

A. I can't remember whether I said that or not; I will not say I did not say that to you.

Q. Will you swear that the very next day—or that very day—you did not go in before the referee and swear that you had sold them in June, and also swear that this Perego stock was bought on my account in the same June?

A. Well, I can't remember what evidence I testified to without my attention is called to it in some other way; I don't know whether I did or not.

Q. I asked you whether you did not testify that same day, or the day before or the day after, before the referee in the court-house, in the month of March, 1870, that you had sold my bonds in June, and in the same June that you had bought this Perego stock on my account for about the same amount, or words to that effect?

A. I think I can answer it now. We were not before any referee in the court-house first. Now, what question comes next in order? We were not before any referee in 1870.

Q. Did you not testify before somebody in the court-house, Mr. Spier being present and myself being present and Mr. Huntley being present?

A. I don't know whether Mr. Huntley was there or not; I think you two had me all alone.

Q. Never mind; did you testify to that?

A. I testified something; I don't know what I testified now.

Q. In the course of that testifying did you make the statements in the question I put to you, or words to that effect?

113 A. I don't know.

Q. If you did make it would it be true?

A. Part would be true and part not. The fact of my selling your bonds in June would not be true; I would like to add to that answer that at the time you and Mr. Spier examined me in the court-house I did not know any more about this case than a child unborn; that it was the first I ever had to do with law or lawyers; I had not these things in my memory at all, and I might have testified to things then that were not true, believing them to be true at the time, and afterwards correcting them in my other testimony when I found they were not so.

Q. Then, if I understand it, you were then as a child and now you are not as a child, or on the trial you were not as a child?

A. Well, I was a pretty old child, but I did not know much about law or lawyers.

Q. Then you knew more about what to testify to on the trial and now than you did at that time?

A. I knew more, because I had gone into and refreshed my memory from books and papers, and could testify a great deal better than I could on that examination in 1870, because at that time I had not made any searches into facts or books or circumstances of the case.

Q. Are you not—and, if so, how long have you been—a member of the regular stock board in this city?

A. Well, I am not a member of the stock board in one sense, and I am in another; I assigned my seat in the stock exchange in 1874 or 1875, and since that time it has never come to my possession again; I think that I became a member of the stock exchange in 1869; I transferred it to the assignee, the clerk of the court in Brooklyn, Bernard J. York; I don't think he holds it now; Mr. Wm. R. Taylor did hold it some two or three months ago; I
114 don't know but he holds it now. By courtesy I acted as a member of that board every day. I don't know where Taylor is; I don't think I have seen him for some three weeks. He has not been in the office of Hussey & Co. for two or three months. He is now with —— ——; he was in the office of Hussey & Co., I think, not far from two years. Hussey & Co. is composed of Messrs. E. A. Hussey and George B. Ripley. That is all there is now members of the firm of Hussey & Co. I have not an office there. Hussey & Co. have got part of an office now; let out part of it. I go to the stock exchange and transact business when I can get anything to do.

Q. You have a perfect right to go. Then, being a stock broker at the time you testified in this way, do you think you were just such a child as you now would make yourself out to be at the time you gave that testimony?

A. What is the question?

Question repeated.

A. Yes.

Q. Was your memory of the facts worse at that time than now?

A. A great deal. I don't know when the suit commenced. There had been nothing done in it before that time—not that I know of.

Referring to book.

I have got it here; the suit commenced October 20th, 1868; the papers were served October 20th, 1868; don't know that I got a letter from the gentleman, now Judge Speir, shortly after Mr. Palmer left here; at all events, the papers being served in October, 1868, if this examination was in March, 1870, that would be a year and a half after the suit would be going on.

Q. Was not your scheme at that time to cheat me out of
115 these bonds and the proceeds of them, to put this purchase of the Perego stock against the proceeds of those bonds and then swear to a settlement with Stephen W. Palmer, and in that way pay me off?

A. No, sir; it never was my scheme.

Q. Having that decided against you, and knowing that the supreme court of this city and county has pronounced that that was a fraud—the whole thing—have you not altered it now by admitting the liability and attempting to show that you had a right to sell these bonds?

A. The referee, Mr. Scott, decided against me in the suit; why, I don't know; I at that time was so much involved, and having no

money to appeal, and feeling that I never could get on my legs again, I never took the trouble even to inquire why or on what grounds he decided against me, but I learned that all the evidence, so far as I ever did learn anything about it, was thrown out, and the whole thing based on the contract or letter; I am informed that he gave his opinion that it was a technical conversion, and that the contract showed what was meant, and he held me to the contract alone and threw out all other evidence; that is the way I understood the decision.

Q. Then the claim is now, and you, instead of basing it upon a conversion of my bonds, and on purchasing this Perego stock on my account, and on a settlement with my brother, you now base your claim upon your having a right to sell the bonds originally?

A. I never claimed any right of selling the bonds; I did claim the right of hypothecating them; I don't think I ever claimed that I had sold them.

E. A. HUSSEY.

Q. Speaking of the partnership that you had at the time you received these bonds—I think you mentioned the gentlemen's names—
116 will you be kind enough to tell us when that partnership began and when it ended, and if any change was made at any time, and if there was any such change when it took place and when it was?

A. I can't remember the date when Mr. Ladd became a partner, but I should judge in about the first part of 1864; and about two months after that Captain Jacob Cobb was taken in as a partner. Now, Captain Cobb died, I think, in the last part of 1866, which dissolved the partnership. Mr. Ladd was sick at that time and went home and died shortly after.

Q. They were both alive at the date of this receipt for these bonds?

A. Yes, sir.

Q. What was the business of the partnership?

A. General shipping and commission business; I was, after the receipt of those bonds, carrying on brokerage and banking business; not that partnership; there was no other partnership carried on under the name of E. A. Hussey & Co.; the firm's name is to that receipt.

Q. Well, if the firm were not carrying on banking business, were your representations to Mr. S. W. Palmer correct?

A. Yes, sir; I represented to Mr. S. W. Palmer that I thought myself of going into the banking business, which I afterwards did; the receipt of these bonds was preparatory to or after I went into the banking business and for purposes of the banking business.

Q. Then if E. A. Hussey & Co. did not carry on any banking business, how came the receipt for these bonds to be by them and not by you if you had a separate banking business?

A. I did not have a separate banking business; when the firm of E. A. Hussey & Co. were dissolved I formed a new firm.

Q. What I want is this: You did not see Stephen W. Palmer

after those receipts—after you have told us that you received these bonds and sent that receipt, I think near the 1st of May, 1866, and you received the bonds originally a day or two before; and you have also told us that from that time for three years about
117 you used them and pledged them from time to time for your business; now, what I want to ask is, what sort of business had you used them for between the 1st of May and the latter part of that year when you say the partnership was broken up by the death of the two partners?

A. We had used them to borrow money on for whatever purposes we might wish money.

Q. The letters that you spoke of as writing to me and those I addressed to you, that you have spoken of on your direct examination as receiving on the subject of these bonds from me, were all written under the name of E. A. Hussey & Co., were they not?

A. No, sir. I don't know but what all your letters were written to E. A. Hussey & Co. I remember writing to you that.

Q. I did not ask what was in the letters; I merely ask in whose name the letters were written; how was it in reference to the letters that during those months you yourself wrote to me?

A. Most of them would have been written in the name of E. A. Hussey & Co.; the letter of the 4th of March, 1866, I wrote in my own personal name.

Q. Then, after this partnership broke up and you made this arrangement you have sworn to, if I understand you, you continued to use these bonds in your individual business, pledged them for your own individual liability?

A. They were used by Hussey & Co., successors to E. A. Hussey & Co.; the successors of E. A. Hussey & Co. were the partnership made up of George E. Atwood and myself, under the firm name and style of Hussey & Co.; that was formed almost immediately, I think, after the death of Cobb; Ladd was the last one who died; Ladd went out of the firm when Cobb did; Atwood was not in the company with Ladd; that continued, I think, about three or four months perhaps, and I continued to use the bonds in this way, pledging them for the debts of E. A. Hussey & Co., of which
118 Atwood and myself were the copartners; at the end of that four months I carried on the business alone and still continued to use these bonds in the same way; when they were finally disposed of I was alone in business. I don't think S. W. Palmer ever asked me where they were. I told him the bonds were pledged.

Q. Will you swear that S. W. Palmer did not ask you distinctly where these identical bonds were?

A. No; but my impression is that he did not.

Q. Did you hear him swear that he did in this suit, and that you would not tell him?

A. No; I don't remember to have heard him.

Q. Do you recollect my asking you in 1870, some two years afterwards, where they were at that time—I mean asking you before the referee?

A. I don't remember whether you did or not; at the time S. W. Palmer was here they were in the hands of Cauldwell & Co. and the Corn Exchange Bank; they never were redeemed from Cauldwell & Co.; the Corn Exchange Bank sold them to pay the loan; Cauldwell & Co. took them themselves and sold them to satisfy the loan; they never came into his hands from those people; the Corn Exchange bonds I sold as broker for the bank myself; the other bonds, Cauldwell's bonds, were taken by himself and sold by himself. I sold them for the Corn Exchange Bank about the middle of January, 1868; the bonds that I sold I had the possession of in this way, that the loan was called, I sold the bonds, drew my check for the Corn Exchange Bank for the amount of the loan, took the bonds up, and delivered them to the party to whom I sold them, and deposited their check to make the account good in the Corn Exchange Bank.

Q. Can you remember how much of the bonds it was that you so sold?

A. There was 9,600 sold to Bookstover & Slosson; 5,000 sold to Jay Cooke & Co.

Q. They were all the Corn Exchange loan?

A. Yes.

119 Q. Is not this the first time that you have made the statement you have now in my hearing in reference to what became of these bonds?

A. I can't remember whether it is or not.

Q. Don't you know that you were asked distinctly, both on your examination at the court-house and also on the trial, what became of these bonds?

A. I think I was, and could not answer it because I had not investigated that part of it.

Q. Do you recollect, in the examination in March, in speaking of this Perego stock and paying the money for it, that you stated that you paid for me for Perego stock, and that you got the certificates for the stock from a man by the name of Creighton, and that you handed those certificates to S. W. Palmer?

A. I remember of stating that and afterwards correcting myself—that I did not hand those identical certificates to S. W. Palmer, because I got that stock in two large certificates which had to be broken up into 100-share lots to make it a good delivery, and which I afterwards had done; after I got the two large certificates I had them retransferred into 100-share lots, and those certificates I handed to S. W. Palmer.

Q. Do I understand you to say that when you were examined in the court-house that that was the account you gave of that transaction?

A. I have a remembrance of saying something to that effect.

Q. Was not the alteration that you speak about attempted to be made after the production of the certificates of the stock by which the certificates were shown to be issued directly to yourself and not to Creighton or any one else?

A. The certificates were never shown to be issued directly to myself.

Q. (Question repeated.)

A. These two certificates, representing 2,000 shares of stock, was not a good delivery on the street. Before I would take the stock I had them transferred to make them a good delivery. Some
120 I had transferred into my name and some I had transferred into other names to make them a good delivery. The stock was bought at $9\frac{3}{4}$ a share, and I had orders from you to sell it at $15. The stock had to be put into a position to be salable or made into a good delivery. The stock never got up as high as $15; sold as high as between twelve and thirteen dollars a share. Now, of course, it would be very necessary for me to have this stock in what they call a good delivery on the street, and not to have it in two certificates, so I could not deliver the same certificates that Creighton held in the same shape.

Q. Now, let there be no misunderstanding. I understand you to say that you had my order to buy and my order to sell for $15 a share, and this was the reason why you had the stock put in the shape you have described. Is it so?

A. Yes, sir; one of the reasons.

Q. Is that correct?

A. The reason is that any stock that I would hold in my office I would have put in shape as soon as I could to make good delivery of it.

Q. Don't you see that what you are now saying is no answer to my question? I am not asking you what you did in your office. In this particular case, you having my order to buy and my order to sell for $15, was that the reason you put the stock in the shape that you did?

A. That was one of the reasons. Another reason was that it was my duty as a broker to have it in suitable shape.

Q. Are you entirely sure that what you are now stating is true?

A. Well, I ain't sure of anything in this world, but I am very positive.

Q. Don't you know that the order that you induced me to sign to sell that stock was not sent you till a fortnight after the stock was put in the shape you now say it was put in? Now, try that.

A. I don't know whether it was or not; very likely it was a fortnight after; I can't remember.

121 Q. Now, if was a fortnight after, don't you see that it is utterly impossible for that to have been the reason you put it in the shape you say you did?

A. I supposed you would want to sell the stock from what transpired, and it was my duty to put it in negotiable shape.

Q. I only speak of when you swear you had my order to sell.

A. I did not say I had your order at that time; I don't remember; I only know I did have an order of that kind.

Q. Don't you know that the reason you gave just now for it, that you had an order to buy and an order to sell at $15, that that reason won't hold water?

A. No; I am not manufacturing anything to hold water; I am telling the truth just as near as I can remember.

Q. Have you not now discovered that when you say you had this order to sell as a reason why you put it in that shape that that could not possibly be true?

A. No; because I don't know that what you state is true; I don't remember.

Q. Suppose the order was after?

A. If the order was after it would not necessarily change my action in the stock, because it would be my duty, independent of that, to put it in that shape.

Q. Having got the block certificate, you afterwards changed it so as to make it appear that it was issued to yourself; is that it?

A. I have stated that having bought this stock, and the parties from whom I got it holding it in two, or perhaps three, large certificates, the whole two thousand shares of stock, I made them go and transfer it. Then they asked me who I wanted it transferred to, and I said "You can transfer so much to my name, and so much to some other name—Mr. Flanders, I think, who was in the office, and there might be one or two others. I think Mr. Josephson—I think some was transferred in his name. Now, this transfer was made in this way that people might not know if I was selling stock. If
122 the stock all stood in my name they would all say, "Hussey is selling stock; he is interested in this," and it would prevent me, or spoil my market, perhaps, for selling stock.

Q. Do you not know that what you are saying is no answer to my questions. What I ask you is this: Whether at the time you purchased this stock for me it was in somebody else's name, and that you afterwards put it in your own name and these other people's names, if you did put it in the other people's names, for the purpose you have described; is that so or not?

A. What purpose that I described?

Q. The purpose was so that you could sell it and deliver it, and it would be a good delivery?

A. Have I not just said so in my answer?

Q. You have not said so, but I would like you to say it.

A. If you read my answer you will see. Read my answer, Mr. Stenographer.

Answer read, at folio —, commencing "I have stated that having bought this stock."

WITNESS: A. I think that is an answer to the question.

Question repeated to witness, beginning "Having got the block certificate," from folio —.

A. No.

Q. Did you have it charged to yourself before you purchased it?

A. I had negotiated the purchase before.

Q. Did you pay for it immediately upon having it transferred to you—put it in your name?

A. My best memory is that it was transferred several days before they were enabled to get the certificates. It might be transferred on a certain day, and perhaps for several days after they could

123 not get the transfer of the certificates. Some days after the stock was taken from the transfer office and paid for.

Q. Then, when you received the certificates of stock in your own name, or whosoever names they were in, you paid for them?

A. Yes.

Q. Before receiving those certificates, did you see them at all yourself?

A. Yes.

Q. How long before, and where did you see them?

A. I think they got the certificates out of the transfer office; that they were brought into the office for the purpose of my signing the powers of attorney, and for the other parties signing the powers of attorney to whom they were transferred, because of course stock transferred on the books to these different parties would belong to them until they had signed their names to the blank transfers or blank powers of attorney on the back; then it became negotiable in whosoever hands it might be. Now, I am inclined to think that this stock was brought into the office as soon as they could get it out of the transfer office, and that the parties to whom it was transferred signed the blank powers of attorney as soon as possible, so that they might have the stock in their own hands.

Q. Then do I understand you to swear that when the stock was transferred to you, and a certificate issued, that you were the holder of the stock—that that could be done without your consent and without your saying anything?

A. It could be done.

Q. That stock could be issued to you without your consent when you were not the holder?

A. Certainly; I can go and put a share of stock in your name to-day, and it is yours, and I can't get it without your signing your name.

Q. I am talking of stock issued by the company to you; could that be done without your consent?

A. Certainly it could.

124 Q. Then you could be made a shareholder in the company, and your name entered on the books of the company as one of the shareholders, without your consent at all?

A. Without my consent at all.

Q. And stock issued to you?

A. No; when I take the stock I sign a receipt to it, and I can go and transfer stock to your name without your knowledge if I have a mind to lose my shares; but you don't consent thereto unless you sign a receipt for it.

Q. Do I understand you that this stock was issued to you before you ever purchased it all all?

Mr. HUNTLEY: Defendant's counsel calls plaintiff's attention to the fact that the witness has already stated that he had negotiated the purchase of the stock, but by being in large blocks he did not take it until it was broken up into smaller ones, and that he has explained, and objects to any further question on that subject, as it has been thoroughly exhausted.

A. I have testified before that I had negotiated for the purchase of it before; I had agreed to take it before it was transferred; all through that trial I claimed it as a fact that the stock was bought for you; also as a fact that I paid about $20,000 for you in cash; between nineteen and twenty thousand; and this was in June, 1857, and I think this trouble *that* was brought on me by Whann & Co. in the summer of 1867; I don't remember.

Q. When you say that you paid between nineteen and twenty thousand dollars in cash for me, will you swear that Whann had not failed before that?

A. I don't know whether it was before or after.

Q. Will you swear that you did not swear in the court-house, in March, 1870, that that failure was in April, '67?

A. No; I don't remember.

Q. Will you swear you did not?

125 A. No, because I don't remember; I have no means at my hand that I know of to remember when Whann did fail.

Q. At all events the failure of Whann so crippled you that you could not pay twenty thousand dollars very readily?

A. The failure of Whann did not cripple me at all; troubled me, but did not cripple me; it troubled me to lose between twenty and thirty thousand dollars.

Q. Did you ever represent to me that Whann & Co. disposed of my bonds?

A. I have testified on this re-examination that I corrected it afterwards.

Q. I will repeat the question. I put the question now independent of what you said before or have said now. Did you represent to me that Whann & Co. sold some of these bonds?

A. No, sir; never represented that they sold these bonds.

Q. Did you represent that Whann & Co. disposed of any of these bonds?

A. I think I represented that by the failure of Whann & Co. I lost $25,000 of bonds, and I was under the impression that some of them were yours, which I afterwards ascertained to be a mistake.

Q. Did you swear that they had disposed of them?

A. I don't think I said that; I think that I said I lost them through their failure, having deposited them with Whann & Co.

Q. I would put this question to you, Whether in that examination I did not put this question: "Can you tell where those are which you say you bought from Creighton for me?"—that is, referring to the certificates of this Perego stock—and you answered, "I delivered them over to your brother and agent, S. W. Palmer." Did you make that statement?

A. I can't say; very likely I did. I have had no copy of that and never have seen it since the examination of 1870, and my memory is not very distinct upon it unless you call me to some particular points.

126 Q. "Do you mean to say that you don't know whether the particular certificates you got from Creighton are in your possession? Answer. They are not. Question. Can you tell where

those are which you say you bought from Creighton for me? Answer. I delivered them over to your brother, S. W. Palmer." Then I put the question: "Do you know what amount of the Creighton certificates that you delivered over? Answer. No." If you did state that would it be true?

A. Can't you just ask what would be true? You have read so much there; it is all general. Can't you manufacture a question for me?

Q. I mean that you delivered over the certificates of stock that Creighton had given you to S. W. Palmer; was that true?

A. I can't say whether Creighton delivered to me the three large block certificates himself, and I had them retransferred into hundred-share certificates, or whether I exacted of him that he should have them transferred and deliver me the stock in negotiable shape. If I exacted that he should deliver me the stock in negotiable shape, I did deliver to your brother, S. W. Palmer, the same identical certificates that he delivered to me. If, on the contrary, I did take the stock in the three large certificates and have it transferred myself, in any event he would deliver me the stock, because the stock, after it was transferred, would be signed by three different parties and handed back to him. He would be the owner of the stock until I had paid for it.

Q. Did you not say at some time that Mr. Creighton had left New York before June, 1867, and you did not know where he was?

A. No, sir.

Q. I understood you to say—perhaps I was wrong—that you were going into partnership with Whann & Co.?

A. There has been nothing said about that on this testimony.

Q. Were you never going into partnership with Whann & Co.?

127 A. I was making negotiations to go into company with him at one time, but those negotiations fell through. I never had any partnership with Whann & Co.

Redirect examination by Mr. HUNTLEY:

Q. What do you mean when you say your memory is not good?

A. I mean that I can't recall circumstances easily, but my memory of those circumstances when recalled to me is very vivid—a lack of recollection rather than of memory. Things lie dormant in my mind until some one suggests something to me that connects my chain of thought, and then it is very vivid.

Q. Did you ever receive from the plaintiff any letters relating to the bonds in question that you have not referred to and testified concerning in your testimony here?

A. I don't know whether I have testified concerning all the letters here that I have received from him or not.

Q. Did you ever receive any from him of a different general character with regard to the bonds and the circumstances under which you were to take them than you have testified here?

Plaintiff objects that it is not competent for the witness to draw

conclusions from language; that all he can do is to state the language itself, and that he should produce the letters.

A. I will say further that I have found all the letters on the subject I could, and have testified, or tried to testify, to the facts in all the letters that I found relating to these bonds.

Q. Will you in a few words explain what is meant by this contract that is referred to by Mr. Palmer in his cross-examination of you with reference to the Perego stock?

A. You want me to explain what led to the purchase of
128 it? What led to the controversy about it was that in June, 1867, we bought, by Mr. Palmer's order, two thousand shares of this Perego stock, paying 9¾ dollars a share for it, which amounted to some nineteen thousand dollars, or a little over. We charged it in the regular course of business in Mr. Palmer's account. We had had a running account with Mr. Palmer for a great many years. When I got in difficulties——

Q. What was it about, this twelve dollars and a half or fifteen dollars?

A. Some time after the purchase we got an order from Mr. Palmer to sell it at 15 dollars a share—14 or 15 dollars a share. The stock never brought that, and so remained charged to his account. I think it sold as high as 13 dollars a share; sold above 12, I know. I mean to say it sold for that which I held it for him. The stock so remained charged to his account until I got involved in December, 1867, and at that time Mr. Palmer stood debit on my books something over 21 thousand dollars; that would be the amount of this stock purchased and some other things that he owed me for. The last part of December, '67, I had a judgment note coming due which I could not pay; these bonds were pledged, which I could not redeem; I was afraid they would take judgment against me, and, examining my books, found that Mr. Palmer was my debtor to this amount, and might embarrass him in some way by perhaps seizing some of his property here, or something; so I wrote him on that account this letter of December 10th, asking him to come on or send some one to settle. When Mr. S. W. Palmer came here he would not, or he did not, redeem the bonds, and it was agreed between us that the bonds should be credited to the account at the market price that day, which was done, and that account was given to Mr. S. W. Palmer to take home to his brother, together with the Perego stock, and the understanding between us was that if Mr. Palmer would help me about taking up this loan with Mr. Butterfield of 20 thousand dollars, on which was pledged 6 thousand shares of this Perego stock, I would give him my notes for the amount of all the Perego stock that he held for what he had paid for this Perego stock,
129 this 2 thousand shares, and my notes for the 20 thousand dollars if he would pay Butterfield, and he could hold all of that stock also; I would further give him as security a building which I was negotiating for in Broadway in exchange for my wife's house, which would fetch an income of 10 thousand dollars a year, I

thought; that if Mr. A. L. Palmer would agree to that he was to write immediately after Mr. S. W. Palmer got home.

Q. You say there were 6 thousand shares or dollars' worth of this stock with Butterfield?

A. Six thousand shares of Perego stock pledged as collateral for the 20-thousand-dollar loan.

Q. Was that this stock?

A. No; but I offered to give him all this stock to hold.

Q. What I asked you was, what the dispute between you was.

A. Though I contend now, and did then, that a settlement was made with S. W. Palmer, Mr. Palmer's agent and brother, whom I had always done business with here for his account, and had never seen Mr. A. L. Palmer, yet Mr. Palmer repudiated afterwards that settlement altogether, which caused this suit.

Q. You claimed that that settlement was made, and Mr. Palmer, the plaintiff, claimed it was not, and that was the contest?

A. Yes; I would like to say further that on the trial of this suit I was told that the referee had been influenced by the great ability of Mr. Palmer, and by the way in which he had been able to badger me on the trial, so that he had decided that the purchase of this stock would be offset against the bonds, and they certainly entered up a judgment against me of a great deal more than I can understand how they got at it, as I did not take any pains to inquire into it at that time, being so low down pecuniarily that I did not think it made much difference whether they had a million-dollar judgment against me or a thousand. At all events, they entered up a judgment, I think, of 30-odd thousand dollars, and I could see no way in my own mind why it should be over 16 or 17 thousand.

130 Q. What is your opinion as to whether Mr. Palmer did badger you on that trial?

A. I really think he did.

Q. Now, in regard to that partnership—in any of your conversations with S. W. Palmer—did you state to him who your partners were to be, or that they were responsible men, or men of ability or means, so that he relied upon them, or did he rely upon you?

I object.

A. I don't think I ever said anything about who were to be my partners to S. W. Palmer. I think I did convey by letter to Mr. Palmer at one time the idea that the copartnership was to be Whann, Hussey & Co.; that at that time there were negotiations and we expected the partnership to be Whann, Hussey & Co., and we would either wait until the partnership was made and give him a receipt for the bonds in the name of Whann, Hussey & Co. or E. A. Hussey & Co., as he might elect. I did not in any other way indicate who were to be the partners. I have said now I had a running account with Mr. Palmer, the plaintiff here, that had been running in the month of May, 1866; I should say about three or four years. The general nature and character of my business with him required fre-

quent and distant communications with him by letter or by agent—sometimes frequent and sometimes distant.

Recross by Mr. PALMER:

Q. You have said that the nature of this dispute was as you have described, and that you had this agreement with S. W. Palmer. Did not S. W. Palmer on that trial distinctly contradict you and swear there never was any such agreement between you and him, and also that he had never settled with you at all, and in point of fact you gave him no kind of satisfaction when he came here at all?

A. Whether he said so in so many words, at all events he conveyed that impression on the trial—the impression that he never had made a settlement with me.

131 Q. And also that he had never made any such agreement as you have described; you have said that he agreed that these bonds should be credited to my account at their par value?

A. Not their par value; at the market value of the day. I have testified that an agreement was made between S. W. Palmer and myself to that effect.

Q. Did not S. W. Palmer distinctly and unequivocally swear that there was not one word of truth in that?

A. If he did not say that he conveyed that idea to the referee; he denied the settlement.

Q. All I want to get at is whether, in addition to all that, did not Mr. S. W. Palmer swear that, so far from the story you have now told about the Perego stock being true, that you induced him to represent to me and to ask me to send you an order for that stock, and you would buy it for yourself and for your own purposes; did not Mr. S. W. Palmer swear to that?

A. I don't think that he did swear to that. He conveyed that, but I don't think he swore that I made that representation to him.

Q. Did he not swear that you called him into your private office and asked him to induce me to let you use my name to your stock, and if I would do so I might have one-half the profit of it, and you would furnish the money and buy the stock and run the risk?

A. My impression is that he did not swear that. I know he tried in every way he could—I know he tried in every way he could to convey to the referee the fact that he had made no settlement, and that I had tried to induce you to buy the stock in your name.

Q. Don't you know that I stated that, having received that communication from S. W. Palmer, that in the order, and with the order I sent you, I wrote you a letter distinctly stating the terms on which you might use my name?

A. I believe you claimed that you testified to that?

Q. Did you not testify on the trial that you never received any letter from me other than that order as to the terms on which you were to buy that stock?

132 A. I don't know whether I did or not; I might have so testified, because that is my impression now.

Q. Will you now swear that you never received a letter from me

other than the order you have spoken of, specifying the terms on which you might buy that stock in my name?

A. No; I won't swear.

Q. Did you ever state that you did?

A. State that I received a letter?

Q. Yes; receive a letter specifying the terms on which this stock was to be bought.

A. I think I stated in the examination—my memory is brought up to it that on the trial you tried to fix the fact that I stated in 1870 that I had received some letters about the stock, but then I always said I received no private letter.

Q. Now, is not what you mean when you say I badgered you, that I put your statements on this subject on one occasion in direct opposition to the statements that you made on the trial, and asked you how you reconciled it?

A. No; that is not what I mean; what I mean by badgering is that I went into this trial without even knowing anything about my own case—without knowing anything about books, without making any preparation for the trial, as I supposed to go to a lawyer was like going to a doctor—put everything in their hands, and that they know everything. I went on the stand under that impression, and what I mean by badgering is that not having prepared myself properly for the trial I testified sometime one way and sometimes another, but intending always to testify what was right, because I had made no preparation for the trial by going in and investigating the facts myself.

Q. And was not my badgering putting in juxtaposition to you—showing what statements you made at one time in reference to a fact, and then showing what statements you testified to at another time, and putting you questions upon that; is not that what you call badgering?

133 A. No; what I mean by badgering is that you put to me insulting questions, throwing reflections on my character as an honest man, causing me to lose my temper, and in every way causing me to be put at a disadvantage on the examination.

Q. Did I do more than this: that when you contradicted S. W. Palmer in reference to this purchase of the Perego stock, and set up that that was *bona fide* bought on my behalf, and that you intended and were trying to put the proceeds of these bonds against that, did I more than ask you if you did not know perfectly well that the whole of that was a concoction for the purpose of endeavoring to cheat me, or words to that effect?

A. Well, if you asked me that question in that way at that time it would certainly make me very indignant, because there was never anything of the kind ever intended or thought of. I was a shipmaster, and not in the habit of controlling myself at all, and it would put me very much in your hands, and I would say things that would not be what I ought to say, and very probably say things that, though intending to say what was true, might not be exactly so.

Q. At all events, whether you meant it or not, you know perfectly

well that you came on the stand and contradicted me flatly, and contradicted S. W. Palmer flatly, in regard to those things.

A. I did contradict you and S. W. Palmer flatly about some things.

Q. Don't you think it possible that the referee would believe what S. W. Palmer swore to instead of what you swore to, especially if it was consistent with everything else?

A. I would rather not give my opinion about the referee at all.

By Mr. HUNTLEY:

Q. Did the dispute which you had with the plaintiff and
134 with S. W. Palmer as to the settlement have any influence whatever upon the final disposition of the bonds?

A. It did not.

By Mr. PALMER:

Q. Will you swear that you did not represent to me by letter that you had never disposed of the bonds until after that settlement, and that you disposed of them because of that settlement?

A. I probably represented to you that I had not disposed of the bonds until after that settlement, because that was the fact. Whether I represented to you that I disposed of them because of that settlement I don't know. I will not swear I did not.

Q. Had the settlement anything to do with your disposing of the bonds—this settlement that you have sworn *that* took place with S. W. Palmer?

A. No, sir; I had to dispose of the bonds whether or no, because I could not take them up.

Q. Then, if you represented to me, by letter or otherwise, that you had disposed of them because you had the right to do so by reason of that settlement, that would not be true, would it?

A. I think to-day I had the right to by reason of that settlement.

Q. Well, then, having the right by reason of that settlement, what do you mean by saying that the settlement had nothing to do with the disposition of the bonds?

A. The fact is it did not; but I could not take the bonds up, and they had to be sold regardless of the settlement.

Q. Did you not claim to me that you had that right by virtue of the settlement?

A. I don't know whether I did or not. I certainly thought I had the right.

Q. But, unfortunately for you, you have sworn that that had nothing to do with the disposition of the bonds.

A. I say so now.

135 Q. Then am I to understand that, although you claimed you had the right to dispose of the bonds by virtue of that settlement, it would be correct for you to say that the settlement had nothing to do with the disposition of the bonds?

A. Yes, sir; that would be correct.

E. A. HUSSEY.

Mr. SPIER: We offer in evidence, in rebuttal of the facts stated in the affidavit of the plaintiff, a certified copy of the referee's report and a supplemental report of the judgment in the action. We also offer in evidence in the same way a copy of the proceedings in the action.

Mr. HUNTLEY: That is objected to on the ground that the papers are referred to by the plaintiff, and extracts made from them, or part of them, in the papers submitted to the court in opposition to this motion, and that they were all in his possession, or where he could get at them, before this motion was heard.

ACALUS L. PALMER recalled.

Mr. HUNTLEY: I object, that he has been on the stand, and given his testimony, and been exhausted.

By Mr. SPEIR:

Q. You have read over this testimony, marked Testimony in the case of Palmer against Hussey, before referee Scott?

A. I was present at the trial, and this was furnished to me at the time, and I read it over, and it was correct so far as I could judge of it at the time.

Mr. HUNTLEY: This is objected to on the ground that the proper person to prove it is the stenographer who took it and
136 wrote it out, and that this witness is incompetent to do it.

The REFEREE: I cannot pass upon that.

WITNESS: All I have to say is this, that I was present at the trial, conducted most of it myself; there was a short-hand writer there; I forget his name; Judge Spier was also with me; Mr. Hnutley was on the other side; this stenographer was employed by us both; that is to say, Mr. Huntley paid one-half of it and I the other; I took care during the course of the trial to see that the evidence was correct, and I can say that it was correct. It is in these papers. A short piece of the evidence was taken the first day, I think, by Judge Spier himself. I think the stenograper was called in afterwards, and these papers that are here are a true report of the evidence given by myself, given by S. W. Palmer, and given by Mr. Hussey and some few other witnesses.

Papers received and marked "Plaintiff's Exhibits A, B, C, D, E, F, G, H, and I, January 13, 1881."

WITNESS: I was also present when this was taken (referring to another paper). It is the deposition taken at the court-house, and it was afterwards put in evidence.

Marked "Plaintiff's Exhibit K, January 13, 1881."

A. L. PALMER.

137 *Opinion.*

ACALUS L. PALMER *ag'st* ERWIN A. HUSSEY.

Motion by defendant for stay of proceedings upon the judgment recovered in this action because of the subsequent discharge of the defendant in bankruptcy.

Richard H. Huntley, for defendant; A. W. Spier and O. P. Buel, for plaintiff.

DANIELS, *J.:*

The judgment in this action was recovered for the value of United States bonds delivered to and converted by the defendant. He held them under the terms of an instrument in writing given to the plaintiff, which has been construed by the court of appeals, and in the consideration which was then given to it, that the court held that the defendant had no right to hypothecate or dispose of the bonds, and because he had done so he was liable to be arrested and held to bail in the action.

Palmer *v.* Hussey, 59 N. Y., 647.

But while he might be properly charged in an action for converting the bonds and held to bail under the provisions of the code, he was not simply on that account deprived of the benefit of his bankrupt discharge as a protection against proceedings afterwards taken to enforce the judgment recovered, for by the provisions of the bankrupt law a demand against the bankrupt on account of goods or chattels wrongfully taken, converted, or withheld by him
138 may be proved and allowed in the bankrupt proceedings (U. S. Rev. Stats., 983, section 5067), and for that reason the discharge after it is granted will relieve the bankrupt from liability arising from such a cause.

Id., 993, sec. 5149.

In order to deprive the bankrupt of the benefit of his discharge it was necessary, therefore, that the case should go further, and that the fact should be established that the debt or demand included in the judgment had been created by actual fraud.

Id., sec. 5117.

The point to be considered for that reason for the purpose of disposing of this application is whether such a fraud has been made to appear against the defendant. The statute, as it has been construed, requires that actual, as distinguished from constructive, fraud shall be established for the purpose of defeating the effect of a discharge. Cites—

Neil *vs.* Clarke, 95 U. S. Rep., 704.
Hennequin *vs.* Clews, 77 N. Y., 427.
Barber *vs.* Stirling, 68 *Id.*, 267.
Row *vs.* Guilleaume, 18 Hun., 556.
Falkland *vs.* St. Nicholas Bank, 21 *Id.*, 450.

The plaintiff undertook to make out a case of this nature against the defendant, and for that purpose the record in the action has been produced, from which it appears that the defendant was charged not only with the conversion of the bonds, but also with a fraudulent and wilful sale of them. It was also charged that he held them in a fiduciary capacity and had misapplied them. These allegations were sufficient to present a case within the exceptions mentioned in section 5117 of the U. S. Rev. Stat., already referred
139 to, for by that section neither a debt created by fraud or while the bankrupt was acting in a fiduciary character is permitted to be discharged by means of the bankrupt proceeding.

The defendant, by his answer, took issue upon the truth of these allegations and the cause was tried in part upon that issue. The trial resulted in a decision against the defendant, and upon these points it was specifically found and determined that he had received the bonds in a fiduciary capacity, and afterwards fraudulently and wilfully sold and disposed of and misapplied them. The judgment in the action was recovered upon these findings of fact, and it must now be regarded as having settled the existence of these facts against him. They were pertinent to and within the issue in the case, and constituted a material portion of the investigation which the referee was required to make for the purpose of effectually disposing of the issues in the action. For that reason these facts have been judicially found to exist in the case, and the judgment has established them as conclusive to that extent against the defendant.

Smith *vs.* Smith, 79 N. Y., 634.
Cromwell *vs.* County of Sac., 94 U. S. Rep'ts, 351.
Campbell *vs.* Rankin, 99 *Id.*, 261.

It appears by the evidence which has been taken in this proceeding that the defendant did intentionally hypothecate the bonds for his own use and benefit, and as the result of that they were appropriated to the payment of his debt *of* which he had transferred [to] them as security. As the contract under which he held the bonds has been construed, this was a violation of the obligations he was under to the plaintiff, and it constituted an intentional or wilful disposition of the property. The view taken of the act by the
140 referee may have been somewhat harsh, but still it seems to have been supported by the circumstances.

But even if it were not the judgment itself cannot be limited or restrained upon that account in this proceeding. It is conclusive upon the subject that the defendant did fraudulently and wilfully dispose of the plaintiff's property while he held it in a fiduciary capacity, and that being the fact, he cannot deprive the plaintiff of his right to enforce the judgment because of this discharge in bankruptcy.

The motion now made must accordingly be denied.

At a special term of the supreme court held in and for the city and county of New York, at the chambers of said court, at the courthouse in said city, on the fourth day of March, 1881.

Present: Hon. Charles Daniels, justice.

ACALUS L. PALMER, Plaintiff,
against
ERWIN A. HUSSEY, Defendant.

A motion by the defendant "that the plaintiff and his attorneys be perpetually enjoined from issuing execution on the judgment herein, and, if issued, from enforcing the same, and from collecting ar attempting to collect the judgment herein, or in any way enforcing or attempting to enforce the judgment herein; and that proceedings in this action, or founded on the cause of action herein, on the part of the plaintiff and his attorneys and agent and on the part of the receiver in the supplementary proceedings referred to in the affidavit annexed to the notice of motion be perpetually enjoined and stayed, and for such other and further relief as to the court shall seem meet upon the ground that the defendant has been discharged in bankruptcy."

141

Having heretofore come on to be heard at a special term of the supreme court in and for the county of New York, on the 14th day of December, 1880, before the Hon. Charles Daniels, justice, and after hearing counsel for the respective parties, and "at the instance and direction of the court, and for its proper information as to the facts to be considered," an order was duly made and entered herein as resettled on or about the 14th day of December, 1880, whereby it was ordered that it be referred to Hon. Wm. H. Leonard to take and report to the court such testimony as should be produced by either party as to the facts and circumstances of the alleged conversion of plaintiff's bonds mentioned in the complaint, and the hearing on the merits of defendant's motion having been adjoined by said order until the coming in of the said referee's report:

Now, the said motion coming on to be heard at a special term of this court in and for the county of New York on the fourth day of March, 1881, before Hon. Charles Daniels, justice, upon reading and filing the report of said referee, and on the testimony taken and reported by said referee, and upon defendant's reading and filing the notice of motion and the affidavit annexed thereto of Erwin A. Hussey, sworn to June 12th, 1880, and the order of the general term herein, dated November 26, 1880, and upon plaintiff's reading and filing the affidavit of Archibald W. Spier, sworn to July 19, 1880, and the two exhibits annexed thereto, and the judgment-roll in this action, filed on or about May 16, 1874, and after hearing Messrs. Huntley & Bower, attorneys and counsel for said Hussey, and A. W. Speir and O. P. Buel, counsel for the said Palmer, and on motion of this said counsel for the said Palmer, it is ordered that the motion for a perpetual stay of proceedings on the part of the plaintiff Palmer, and the other relief demanded in said notice of motion, dated June 14, 1880, be denied, with ($10) ten dollars costs, together with one hundred dollars fees to Wm. H. Leonard, referee, on the reference herein, said costs and disbursements to be paid by the defendant to the plaintiff or his attorney.

142

A copy.

W. A. BUTLER, *Clerk.*

Notice of Appeal.

Supreme Court.

ACALUS L. PALMER, Plaintiff,
against
ERWIN A. HUSSEY, Defendant.

CITY AND COUNTY OF NEW YORK:

Please to take notice that the above-named defendant hereby appeals to the general term of this court from the order made and entered herein, dated the fourth day of March, 1881, denying
143 the defendant's motion for a perpetual stay of proceedings on the part of the plaintiff Palmer, and for the other relief demanded in the notice of motion, dated June 12th, 1880, and from each and every part and the whole of said order.

Yours, &c., HUNTLEY & BOWER,
Defendant's Attorneys.

Dated New York, March 17th, 1881.

To Archibald W. Spier, Esq., plaintiff's attorney; William A. Butler, Esq., clerk of supreme court.

144 At a general term of the supreme court held at the court-house in the city of New York on the 6th of May, 1881.

Present: Hon. Noah Davis, P. J.; Hon. John R. Brady, J.

ACALUS L. PALMER, Pl'ff, Resp'd't,
ag'st
ERWIN A. HUSSEY, Def'ts & App'l't.

The appeal from the order entered herein on or about the 4th March, 1881, denying defendant's and appellant's motion for a perpetual stay of all proceedings by the plaintiff and respondent on the judgment herein and the other relief demanded in defendant's and appellant's notice of motion coming on for argument in this court, at the general term thereof, and, after hearing Mr. Huntley, counsel for the appellant, and Messrs. Buel and Spier, counsel for respondent—

It is ordered that said *that said said* order be in all matters affirmed, with $10 costs, besides disbursements.

145 Supreme Court.

ACALUS L. PALMER, Plaintiff and Respondent,
against
ERWIN A. HUSSEY, Defendant and Appellant.

CITY AND COUNTY OF NEW YORK:

SIR: Please to take notice that the defendant above named appeals to the court of appeals from the order of the general term of this

court entered herein in the clerk's office of the city and county of New York on the 2d day of June, 1881, and dated the 6th of May, 1881, affirming the order made by Daniels, J., on the 15th of March, 1881, herein, denying the defendant's motion for a perpetual stay of all proceedings by the plaintiff on the judgment herein and the other relief demanded in defendant's notice of motion, and from each and every part and the whole of said order.

Yours, &c., HUNTLEY & BOWER,
Def't's Att'ys, 35 Pine Street, N. Y. City.

Dated New York, June 3, 1881.

To A. W. Spier, Esq., pl'ff's att'y; to William A. Butler, Esq. county clerk.

146 Supreme Court. General Term.

ACALUS L. PALMER *against* ERWIN A. HUSSEY.

Davis, P. J., and Brady, J.

Order affirmed, with $10 costs and disbursements, on the opinion of Daniels, J.
(May 27, 1881.)

STATE OF NEW YORK, }
City and County of New York, } *ss:*

I, William A. Butler, clerk of the supreme court in and for said county, do hereby certify that the foregoing consist of certified copies of the notice of appeal, the order appealed from, and the papers on which the court below acted in making said order.

In witness whereof I have hereunto set my hand and affixed my official seal this 6th day of June, A. D. 1881.

[SEAL.] WILLIAM A. BUTLER, *Clerk.*

147 STATE OF NEW YORK, }
City and County of New York, } *ss:*

I, William A. Butler, clerk of the said city and county and clerk of the supreme court of said State for said county, do certify that I have compared the preceding with the original remittitur of the court of appeals and the order of the supreme court thereon in the action entitled Acalus L. Palmer against Erwin A. Hussey, on file in my office, and that the same are correct transcripts therefrom and the whole of such originals.

In witness whereof I have hereunto subscribed my name and affixed my official seal this 16th day of March, 1882.

[New York Seal.]

WM. A. BUTLER, *Clerk.*

Endorsed: Filed Jan. 19, 1882.

148 To the Honorable Samuel Blatchford, associate justice of the Supreme Court of the United States:

And now comes Acalus L. Palmer, a native British subject and a resident of St. John, province of New Brunswick, Dominion of

Canada, by Archibald W. Speir, his attorney, and complains that by the record and proceedings and also in the rendition of a judgment in a suit between the said Acalus L. Palmer, plaintiff and respondent, and Erwin A. Hussey, defendant and appellant, in the court of appeals of the State of New York, being the highest court of law and equity of said State in which a decision could be had in said suit, and on which a final judgment, order, and decree of the supreme court of the State of New York was rendered against him on the 13th day of February, 1882, in accordance with the laws of the State of New York and the practice of said courts in said suit, and wherein
149 was decided, adjudicated, ordered, and judgment rendered under the United States statute entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2d, 1867, and all amendments thereto, and on certain alleged bankruptcy proceedings in the United States district court for the eastern district of New York of the said Erwin A. Hussey as a voluntary bankrupt, and an alleged certificate of discharge in bankruptcy granted by said last-named court in said proceedings, that the debt on which the said Acalus L. Palmer recovered judgment against the said Erwin A. Hussey was discharged by said alleged bankruptcy proceedings under and by virtue of said act aforesaid, and also that said debt was not excepted from said discharge by the provisions of the 33d section section of said act and section 5117 of the Revised Statutes of the United States.

And your petitioner claims that the right was vested in him under and by virtue of said act of the 7th March, 1867, and the said amendments thereto; that the said alleged discharge in bank-
150 ruptcy, dated the 17th day of May, 1880, was not granted on an application made within the time specifically limited and required by the 29th section of the said bankrupt act of 1867, to wit, that Erwin A. Hussey did not apply for a discharge under said act within one year from the date of his alleged adjudication as a voluntary bankrupt, and that at the time the said alleged discharge was granted the said bankruptcy proceedings, if any there were, had previously lapsed, come to an end, and did not exist at the time said discharge was granted, and especially under sections 29 and 33 of said act and section 5117 of the Revised Statutes of the United States to proceed under said judgment and enforce the same, and that said debt and judgement was not discharged by said discharge in bankruptcy, and said decision was against said rights so claimed as aforesaid by the said Acalus L. Palmer, all of which appears in the record and proceedings in said suit, and manifest error has happened to the great damage of the said Acalus L. Palmer.

151 Wherefore he prays for the allowance of a writ of error and such other process as may cause the same to [be] corrected by the said Supreme Court of the United States; and your petitioner will ever pray, &c.

ACALUS L. PALMER,
Petitioner.
ARCHIBALD W. SPEIR,
Attorney for Petitioner.

152 CITY AND COUNTY OF NEW YORK, *ss:*

Archibald W. Spier, being duly sworn, says he is the attorney for the petitioner named in the foregoing petition; that he read the said petition; that it is true to the knowledge of deponent, except as to those matters stated on information and belief, and as to those matters he believes it to be true, and the grounds of deponent's belief is the fact that [he] has been the acting attorney for the petitioner in the action of Palmer *v.* Hussey described in said petition; and deponent is informed that the said petitioner is not within the city and county of New York, and which is the reason why the petition is not verified by the petitioner.

A. W. SPIER.

Sworn to before me this 7th Feb'y, 1884.

[SEAL.] G. GARRETSON,
Notary Public, N. Y. County.

153 *Writ of Error.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the justices of the supreme court of the State of New York, Greeting:

Because in the record and proceedings and also in the rendition of a judgment of a plea which is in the said supreme court of the State of New York before you, or some of you, upon the decision of the court of appeals of the said State of New York, the said supreme court being the highest court of law or equity in the said State of New York in which a judgment could be had on said decision of the said court of appeals in the said suit between Acalus L. Palmer and Erwin A. Hussey, and wherein was claimed by the said Er-
154 win A. Hussey, under the statute of the United States entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved the 2d day of March, 1867, and all amendments thereto, and certain alleged bankruptcy proceedings, in the United States district court for the eastern district of New York, of the said Erwin A. Hussey, as a voluntary bankrupt, and an alleged certificate of discharge in bankruptcy granted by said last-named court in said proceedings, that the debt on which the said Acalus L. Palmer recovered judgment against the said Erwin A. Hussey was discharged by said alleged bankruptcy proceedings under and by virtue of said act aforesaid and all amendments thereto, and also that said debt was not excepted from said discharge by the provisions of the 33d section of said act, and section 5117 of the Revised Statutes of the United States; and also wherein it was claimed by the said Acalus L. Palmer that the right was vested in him under and by virtue of said
155 act of the *of the* 7th March, 1867, and all amendments thereto; that the said Hussey's alleged discharge in bankruptcy dated the 17th day of May, 1880, was not granted on an application made within the time specifically limited and required by the 29th section of the said bankrupt act of 1867, to wit, the said Erwin A. Hus-

sey did not apply for a discharge under said act within one year from the date of his alleged adjudication as a voluntary bankrupt, and at the time the said alleged discharge was granted the said bankruptcy proceedings, if any there were, had previously lapsed, come to an end, and did not exist when said discharge was granted; and also wherein it was claimed by the said Acalus L. Palmer that the right was vested in him under and by virtue of said act of 1867, and especially section 33 of said act and section 5117 of the Revised Statutes of the United States, to proceed under said judgment and enforce the same, and that said debt or judgment was not discharged by the said discharge in bankruptcy, and the decision was against the said right, title, privilege, and exemption so claimed as foresaid by the said Acalus L. Palmer, all of which is repugnant to
156 said act and statute, and also repugnant to section 29 of said act of 1867, and also repugnant to section 33 of said act and section 5117 of the Revised Statutes of the United States:

Therefore a manifest error has happened, to the great damage of the said Acalus L. Palmer, as by his complaint appears. We, being willing that the error, if any has happened, should be fully corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then and under your seal, distinctly and openly, you send the record and the proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 2d Monday of October next in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, which of right and according to the laws and customs
157 of the United States should be done.

Witness this 11th day of February, 1884, Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States.

[Seal of U. S. Circuit Court, South. Dist. New York.]

TIMOTHY GRIFFITH, *Clerk.*

The foregoing writ is allowed February 9th, 1884, by me.

SAM'L BLATCHFORD,

Associate Justice of the Supreme Court of the United States.

158 [Endorsed:] Acalus L. Palmer *vs.* Erwin A. Hussey. Writ of error. Archibald W. Speir, attorney, No. 26 Broad St., New York city. Filed Feb. 11, 1884. Copy lodged for def'd't when called for.

159 *Copy Bond.*

Supreme Court of the United States.

ACALUS L. PALMER *ag'st* ERWIN A. HUSSEY.

Know all men by these presents that we, William H. Nevins and Peter T. Nevins, both of the city and county of New York, are held

and firmly bound to the above-named Erwin A. Hussey in the penal sum of six hundred [and] fifty dollars ($650.00), to be paid to the said Erwin A. Hussey, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

160 Whereas the above-named Acalus L. Palmer has presented a writ of error to the Supreme Court of the United States to reverse the judgment of the supreme court of the State of New York, entered on the decision of the court of appeals, and for the sum of two hundred and sixty-five $\frac{45}{100}$ dollars, on the 13th day of February, 1882:

Now, therefore, the condition of this obligation is such that if the above-named Acalus L. Palmer shall prosecute his said writ of error to effect, and answer all costs and damages if he fail to make good his plea, then this obligation to be void; otherwise to remain in full force and effect.

In witness whereof we have hereunto affixed our respective hands and seals this 4th day of February, 1884.

WILLIAM H. NEVINS. [SEAL.]
PETER I. NEVINS. [SEAL.]

Witness:
CHARLES NETTLETON.

161 STATE OF NEW YORK, } ss:
City and County of New York, }

I, the undersigned, Charles Nettleton, a notary public for New York county, in N. Y., do hereby certify that on the 4th day of February, 1884, before me personally appeared William H. Nevins and Peter I. Nevins, named in the foregoing bond and undertaking, and known to me, and to me known to be the individuals described in and who executed the above bond and undertaking, and each for himself severally duly acknowledged before me that he executed the same for the uses and purposes therein expressed.

In witness whereof I have hereunto set my hand & affixed my official seal this 4th day of February, 1884.

[SEAL.] CHARLES NETTLETON,
Notary Public for New York, State of New York,
117 *Broadway, N. Y. City.*

162 STATE OF NEW YORK, } ss:
City and County of New York, }

On this 4th day of February, 1884, personally appeared before me, the undersigned, William H. Nevins and Peter I. Nevins, the sureties named in the foregoing bond and undertaking, who, being each severally duly sworn, says, each for himself, that he is a resident and a freeholder within the State of New York, and is worth

the penalty of the bond and undertaking over all the debts and liabilities which he owes or has incurred and exclusive of property exempt by law from levy and sale under an execution.

WILLIAM H. NEVINS.
PETER I. NEVINS.

Sworn to before me this 4th day of February, 1884. In witness whereof I have hereunto set my hand & affixed my official seal this 4th day of February, A. D. 1884.

[L. S.] CHARLES EDGAR MILLS,
Notary Public for New York, State of New York,
117 *Broadway, N. Y. City.*

The foregoing bond is approved & as a supercedeas bond February 9th, 1884.

SAM'L BLATCHFORD,
Assistant Justice of the Supreme Court of the United States.

A copy.
[New York Seal.]

PATRICK KEENAN, *Clerk.*

163 [Endorsed:] Acalus L. Palmer *vs.* Erwin A. Hussy. Bond. Archibald W. Speir, attorney, 26 Broad St., New York city.

164 UNITED STATES OF AMERICA, *ss:*

To Erwin A. Hussey, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error issued by the clerk of the circuit court of the United States for the southern district of New York, and a copy of which is lodged for you in the clerk's office of the supreme court of the State of New York, in the city and county of New York, wherein Acalus L. Palmer is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment, order, or decree rendered against the said plaintiff in error in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness this 9th day of February, 1884.

SAM'L. BLATCHFORD,
Associate Justice of the Supreme Court of the United States.

165 ACALUS L. PALMER *ag'st* ERWIN A. HUSSEY.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Harry S. Rowell, being duly sworn, says that on the 11th day of February, 1884, deponent served the annexed citation upon Erwin

A. Hussey, the defendant in error named in said citation, in the city of New York, at No. 66 Broadway, the said defendant's place of business, by delivering a copy of said citation to the said defendant and leaving it with him in his possession, and also at the same time exhibiting to the said defendant the annexed citation and the judge's signature thereto.

HARRY S. ROWELL.

Sworn to before me this 12th day of February, 1884.

[Seal Michael W. Nolan, Notary Public, Kings County.]

MICHAEL W. NOLAN,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

166 [Endorsed:] Acalus L. Palmer *vs.* Erwin A. Hussey. Citation & proof of service. Archibald W. Speir, attorney, No. 26 Broad street, New York city. Filed Feb. 12, 1884.

167 *Assignment of Errors.*

U. S. Supreme Court.

ACALUS L. PALMER, Plaintiff in Error,
against
ERWIN A. HUSSEY, Defendant in Error.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of said Court, at the Capitol in Washington, comes the said Acalus L. Palmer, plaintiff in error, by Archibald W. Speir, his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid in form aforesaid given was given for the said defendant in error against the said plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiff against the said defendant.

And the said plaintiff prays that the judgment aforesaid
168 for the error aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that the said plaintiff may be restored to all things which he has lost by occasion of said judgment, &c., &c., &c.

ARCHIBALD W. SPEIR,
Attorney for Plaintiff in Error.

A copy.
[New York Seal.]

PATRICK KEENAN, *Clerk.*

169 [Endorsed:] Acalus L. Palmer *vs.* Erwin A. Hussey. Assignment of errors. Archibald W. Speir, attorney, 26 Broad St., New York city.

170 STATE OF NEW YORK, }
City and County of New York, } ss:

I, Patrick Keenan, clerk of the said city and county and clerk of the supreme court of said State for said county, do certify that I have compared the preceding with the original record on file in my office and that the same is a correct transcript therefrom and the whole of such original record, and that a copy of the writ of error was lodged with me for the defendant.

In witness whereof I have hereunto subscribed my name and affixed my official seal this twelfth day of February, 1884.

[New York Seal.]

PATRICK KEENAN, *Clerk.*

Endorsed on cover: New York supreme court. No. 445. Acalus L. Palmer, plaintiff in error, *vs.* Erwin A. Hussey. Filed 24th October, 1884.

119-96

IN THE

Supreme Court of the United States.

ACALUS L. PALMER,
Plaintiff in Error,

against

ERWIN A. HUSSEY,
Defendant in Error.

Sir: Please to take notice that on the annexed affidavit, the writ of error herein, the record returned therewith, the assignment of errors, joinder in error and all proceedings herein, the undersigned will move this Court, on Monday, the 18th day of October, 1886, at 12 o'clock noon of that day, or as soon thereafter as counsel can be heard, in the Capitol, in the City of Washington, in the District of Columbia, that the said writ of error be dismissed for want of jurisdiction as apparent from the said record, because it therein appears:

First. That no Federal question was raised, specifically or otherwise, by the plaintiff in error in the Court of Appeals, or in the Supreme Court.

Second. That no Federal question was decided by said Courts or either of them.

Third. That the question relied on to give this Court jurisdiction, is not a Federal question.

And in case the dismissal is not granted, that the judgment or order sought to be reviewed be affirmed, because although the record may show that this Court has jurisdiction, it is manifest that the writ was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to require further argument; to wit, such decision is in full conformity with the decisions of this Court in the following cases:

Chapman v. Forsyth, 2 How. U. S. 202.
Neal v. Clark, 95 U. S. 704.
Hennequin v. Clews, 111 U. S. 676.

And for such other and further relief as to the court shall seem meet and just in the premises.

Dated New York, September 18th, 1886.

Yours, &c.,

SAMUEL W. BOWER,

Attorney for defendant in error,

35 Pine street, New York city.

To ARCHIBALD W. SPEIR, ESQ.,

Attorney for plaintiff in error,

26 Broad street, New York city.

IN THE UNITED STATES SUPREME COURT.

ACALUS L. PALMER,
Plaintiff in Error,

against

ERWIN A. HUSSEY,
Defendant in Error.

City, County, and State of New York, ss.:

SAMUEL W. BOWER being duly sworn, says:

I. I am the attorney for the defendant in error herein.

II. That the writ of error herein is to review a judgment or order made by the Supreme Court of the State of New York, pursuant to the remittitur of the Court of Appeals of said State, perpetually staying the plaintiff in error from enforcing his judgment in this action; on the ground that the debt on which said judgment was based was contracted without positive fraud, and was within the operation of, and forever discharged by, the discharge in bankruptcy granted to the defendant in error.

III. That the plaintiff in error did not in the State Courts specifically set up or claim any right, title, privilege, or immunity under the Constitution or any Treaty or Statute of the United States; neither was the decision below adverse to any such right. On the contrary, his entire effort and contention was to prevent the defendant in error from obtaining the benefit of his discharge in bankruptcy.

The question at issue below was: Was the said debt contracted without positive fraud and discharged by the

discharge in bankruptcy? The defendant in error contended successfully that it was; the plaintiff in error unsuccessfully that it was not. No question was raised as to the validity of the discharge, neither was any proof to such effect offered or received.

IV. The debt aforesaid was contracted as proved in the State Courts, as follows:

On the 11th day of May, 1866, the defendant in error, Hussey, received from the plaintiff in error, Palmer, $19,600 par value, of United States bonds, on the written contract that, "these bonds we hold subject to the order of A. L. Palmer, at ten days notice, agreeing to collect the coupons for his account, free of charge, and to allow him *two per cent. per annum* interest on the par value of said bonds, said interest to commence and count June 1st, 1866."

Thereupon, Hussey used said bonds as he deemed he had a right to do under said agreement, by hypothecating them for the purpose of raising money. That at that time he was every way responsible, was a man of large means, being worth at least $500,000, and had no reason to believe that he would not be able at any and all times to return said bonds, according to the terms of said agreement; but that owing to large and numerous losses by the failure of parties indebted to him, and otherwise, he subsequently became insolvent, and when called upon to return said bonds on the 2d day of January, 1868, was unable to do so.

V. That thereupon this action was brought in the said State Courts by the plaintiff in error against Hussey, and a judgment rendered against him for the conversion of said bonds on the 16th day of May, 1874, for the sum of $32,128$\frac{57}{100}$. No positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, was proved or alleged.

VI. After the incurring of the aforesaid debt, and on the 20th of January, 1868, the defendant in error duly

filed his petition and schedules in bankruptcy, in the United States District Court for the Eastern District of New York, praying that he be adjudicated a bankrupt. On the 24th of January, 1868, he was adjudicated a bankrupt. Thereafter, and on the 17th day of May, 1880, due proceedings being meanwhile had, he was granted a regular discharge in bankruptcy. The delay in prosecuting the bankruptcy proceedings, was caused by Hussey's lack of means to pay the necessary fees, was satisfactorily explained to the bankrupt court and adjudged by it to furnish no ground for withholding the discharge.

VII. On the 12th day of June, 1880, less than a month after his discharge, he noticed this motion, for an order perpetually staying the plaintiff in error from enforcing his judgment. The plaintiff in error opposed the motion at first successfully, on the ground of the comity of courts; then, that the debt was not discharged and the judgment record precluded Hussey from showing that the debt was contracted without positive fraud, and was within the operation of the discharge.

But on appeal to the Court of Appeals of the State of New York, and after a full examination of the matter, testimony of both parties having been meanwhile taken, that Court unanimously decided; that Hussey was not precluded by the judgment from proving that the debt was contracted without positive fraud; that he was not guilty of laches in not sooner setting up the bankruptcy proceedings in the State Courts, and, as a fact, that the debt was contracted without positive fraud and was discharged, and remitted the cause to the Supreme Court of the State with directions to grant the motion, which was accordingly done.

VIII. That in my opinion there is no federal question shown by the record. The question above stated is not within the 709th Section of the U. S. Revised Statutes, because it was decided in favor of the bankrupt, and hence

is not a Federal question, and no other question was raised.

IX. That the Court of Appeals decision on the merits, viz., as to the debt in question being within the operation of the discharge in bankruptcy, is in perfect accordance with the doctrine of this Court on the subject, in the cases of Hennequin v. Clews (111 U. S. 676); Neal v. Clark (95 U. S. 704), and Chapman v. Forsyth (2 How. U. S. 202); and in my opinion the question in this case is settled by the doctrine promulgated by this Court in those cases, and therefore it is manifest that this writ of error is sued out for delay only, or that the question on which the jurisdiction depends is so frivolous, as not to require further argument.

Wherefore the defendant in error prays that the writ of error herein be dismissed for want of jurisdiction, apparent from the record, or that the judgment, or order, sought to be reviewed, be affirmed, because, although the record may show that this Court has jurisdiction, it is manifest that the writ was taken for delay only, or that the question on which the jurisdiction depends is so frivolous, as not to require further argument, and for such other and further relief as to the Court may seem meet and just in the premises.

SAMUEL W. BOWER.

Sworn to before me this 18th
day of September, 1886,

A. J. HEATH,
Notary Public,
Kings Co. Cer. filed in N. Y. Co.

No. 445

119-96

NOV 1 1886
JAMES H. McKENNEY,
CLERK.

In the United States Supreme Court.

ACALUS L. PALMER,
Plaintiff in Error.

against

ERWIN A. HUSSEY,
Defendant in Error.

Brief of defendant in error on motion to dismiss writ of error or to affirm.

This is a motion to dismiss a writ of error, issued to the Supreme Court of the State of New York, to review a judgment, or order made by it, in conformity to the remittitur of the Court of Appeals of said State; or, in case a dismissal is not granted, to affirm said judgment, or order.

The dismissal is asked for on the following grounds:

First. No Federal question was raised specifically, or otherwise, by the plaintiff in error, in the said Court of Appeals, or in the said Supreme Court.

Second. No Federal question was decided by said Courts, or either of them.

Third. The question relied upon to give this Court jurisdiction is not a Federal question.

The affirmance is asked for, on the ground, that it is manifest that the writ was taken for delay only; or that the question on which the jurisdiction depends, is so frivo-

lous as not to require further argument; to wit, the decision below is in full conformity with the decisions of this Court in the cases of

Chapman v. Forsyth, 2 How. U. S. 202.
Neal v. Clark, 95 U. S. 704.
Hennequin v. Clews, 111 U. S. 676.

FACTS.

I. The plaintiff in error, Palmer, is, by the judgment or order, sought to be reviewed here, perpetually stayed from enforcing his judgment in this action against the defendant in error, Hussey; because, as the Court below found, the debt on which the judgment was based, was contracted without positive fraud and was within the operation of, and discharged by Hussey's discharge in bankruptcy. (Aff. Par. II, Record, pp. 5 and 6.)

II. No Federal question was shown by the record, nor was any question raised as to the validity of the discharge in bankruptcy. (Aff. Par. III, Record, 1–5, 12–15.)

III. What the plaintiff in error claims to be a Federal question is not disclosed by the Record; but it may be stated to be, was the debt on which Palmer's judgment was based, contracted without positive fraud, and within the operation of, and discharged by Hussey's discharge in bankruptcy?

In the petition for, and the writ of error, the validity of the discharge is questioned; but no such point was taken in the Courts below, and hence it cannot be considered here. (Aff. Par. III, Record, pp. 74–77.)

IV. The debt aforesaid was contracted, as proved below, under the following circumstances, viz.:

On the 11th day of May, 1866, Hussey received from Palmer, $19,600, par value, of United States Bonds, on the written contract that "these bonds we hold, subject to the order of A. L. Palmer, at ten days' notice, agreeing to collect the coupons for his account, free of charge, and to allow him two per cent. per annum interest on the par value of said bonds, said interest to commence and count June 1st, 1866."

Thereupon, Hussey used said bonds as he deemed he had a right to do under said agreement, by hypothecating them for loans.

At that time he was every way responsible; a man of large means; worth at least $500,000, and had no reason to believe that he would not be able at any and all times to return said bonds according to the terms of said agreement; but that owing to large and numerous losses, by the failure of parties indebted to him and otherwise, he subsequently became insolvent, and when called on to return said bonds on the 2d day of January, 1868, he was unable to do so. (Aff. Par. IV, Record, pp. 2, 3, 4, 9, 27, 33, 45–49.)

V. Thereupon, this action was brought in said State courts by the plaintiff in error, and a judgment rendered against Hussey for the conversion of said bonds, on the 16th day of May, 1874, for the sum of $32,128$\frac{55}{100}$. (Aff. Par. V, Record, p. 29.)

No positive fraud, or fraud in fact, involving moral turpitude, or intentional wrong, was proven or alleged. (Aff. Par. V, Record, pp. 4, 9.)

VI. After the incurring of the aforesaid debt, and on the 20th of January, 1868, Hussey duly filed his petition and schedules in bankruptcy, in the United States District Court for the Eastern District of New York, praying that

he be adjudicated a bankrupt. On the 24th of January, 1868, he was adjudicated a bankrupt; thereafter, and on the 17th day of May, 1880, due proceedings being meanwhile had, Hussey was granted a regular discharge in bankruptcy.

The delay in prosecuting the bankruptcy proceeding, was caused by Hussey's lack of means to pay the necessary fees, was satisfactorily explained to the bankrupt court and adjudged by it to furnish no ground for withholding the discharge. (Aff. Par. VI, Record, pp. 4, 8, 9.)

VII. On the 12th of June, 1880, within a month after Hussey's discharge, he noticed this motion for an order perpetually staying the plaintiff in error from enforcing his judgment. Palmer opposed the motion, at first successfully, on the ground of the comity of courts (Record, pp. 7–17); then, that the debt was not discharged, and that the judgment-record precluded Hussey from showing that the debt was contracted without positive fraud, and was within the operation of the discharge. (Record, p. 70.) But on appeal to the Court of Appeals of the State of New York, and after a full examination of the matter, testimony of both parties having been meanwhile taken (Record, pp. 30–70), that court unanimously decided that Hussey was not precluded by the judgment, from proving that the debt was contracted without positive fraud; that he was not guilty of laches in not sooner setting up the bankruptcy proceedings in the State Courts; and as a fact, that the debt was contracted without positive fraud, and was discharged; and remitted the cause to the Supreme Court of the State, with directions to grant the motion, which was accordingly done. (Aff. Par. V., Record, pp. 1–7.)

POINTS.

FIRST.

No Federal question was raised specifically, or otherwise, by the plaintiff in error, in the said Court of Appeals, or in the said Supreme Court.

1st. If such a question was raised, it must appear affirmatively in the Record.

Detroit City R. R. Co. v. Guthard, 114 U. S. 133.

The proper place for such question to appear, is in the affidavit filed by the plaintiff in error in opposition to the motion below. (Record, pp. 12–15.)

But no such question there appears, neither does any such question appear in the proof.

In fact, no such question was raised in any part of the Record. (Facts, Par. II.)

This is a fatal defect.

Cockroft v. Vose, 14 Wall. 5.

2d. Plaintiff in error in the petition for the writ, and the writ itself, claims that the validity of the discharge in bankruptcy is involved, but no such question was raised below, nor any intimation of it, and the record does not show any such question, and, therefore, it cannot be considered here. (Facts, Par. II.)

Farney v. Towle, 1 Black, U. S. 350.
Hoyt v. Sheldon, 1 Black, U. S. 518.
Worthy v. Commissions, 9 Wall. 611.
Warfield v. Chaffe *et al.* 91 U. S. 690.
Susquehanna Boom Co. v. West Branch Boom Co., 110 U. S. 57.
Simmerman v. State of Nebraska, 116 U. S. 54.

3d. The fact assumed to invalidate the discharge, namely, that Hussey did not apply for a discharge within one year from the adjudication of bankruptcy, nowhere appears in the record. Hussey, in his affidavit, shows when he was adjudicated a bankrupt, namely, Jan. 24th, 1868, and when he was discharged, namely, May 17th, 1880; but not one word is anywhere said by him, or any one else, in the record, as to when he *applied* for his discharge; *non constat*, but that he did apply within the year. (Facts, Par. VI.) This is fatal to the jurisdiction.

Caperton v. Bowyer, 14 Wall. 216.

4th.. Even did such assumed fact appear in the record, and had the plaintiff in error claimed that thereby the discharge was involved, it would not raise a Federal question. For the State Courts could not have decided such question. Sec. 5119 U. S. Rev. Statutes provides, "such certificate (of a discharge in bankruptcy) is *conclusive evidence* in favor of such bankrupt of the *fact* and regularity of such discharge," and hence it necessarily follows that in this collateral proceeding the State Courts could not and did not decide such question.

The Ocean National Bank v. Olcott, 46 N. Y. 12.

5th. Furthermore, even if Hussey did not apply for his discharge within one year after his adjudication in bankruptcy, that would not invalidate the discharge. Section 5108 of the U. S. Rev. Statutes as amended in July, 1876, expressly gives the right to apply for the discharge at any time after sixty days (or six months), and before the final disposition of the cause; and there is no proof here that the bankruptcy proceedings had terminated before the application for the discharge; as a matter of fact they had not, and the bankruptcy Court was entirely right, in deciding as it did, that Hussey was entitled to his discharge. (Facts, Par. VI.)

6th. The plaintiff in error, if aggrieved by the decision of the bankruptcy Court, in granting the discharge, should have appealed therefrom, or moved to set it aside within the two years provided by Statute. He has chosen not to avail himself of those remedies, and he certainly cannot in this collateral proceeding attack that decision.

SECOND.

No Federal question was decided by the said State Courts, or either of them.

First. The questions decided are fully disclosed in the opinion of the Court of Appeals (Record, pp. 1–5, Facts VII); they are, is Hussey concluded by the judgment from proving that the debt in question was contracted without positive fraud, and discharged by the discharge in bankruptcy? This is clearly not a Federal question, for it is simply the effect of the judgment in the State Courts.

Lange v. Benedict, 99 U. S. 68.

Second. Was the debt contracted without positive fraud, and is it discharged by the discharge in bankruptcy? This question, as we show in Point Third of this brief, is not a Federal question, as it was decided in the bankrupt's favor.

Third. Was Hussey guilty of laches, in not sooner setting up the bankruptcy proceedings in the State Courts? This, also, is not a Federal question, but relates simply to the time and manner in which, according to the State law and practice, a discharge in bankruptcy is to be pleaded, and in any event, as the decision is in favor of the bank-

rupt, who alone claims the right under it, it is not a Federal question.

Montgomery v. Hernandez, 12 Wheat. 129.
Knox v. Exchange Bank, 12 Wall. 379.
Northern R. R. v. People, 12 Wall. 384.

Hence no jurisdiction arises.

THIRD.

The question, relied on to give this Court jurisdiction, namely: Was the debt in question contracted without positive fraud, and within the operation of, and released by, the discharge in bankruptcy, is not a Federal question.

1st. Because Hussey, the defendant in error, was the only one who claimed any right, title, privilege or immunity under the bankrupt act, and the decision was in his favor.

This precise question came before this Court in the case of Strader *et al.* v. Baldwin (9 How. U. S. 261), and this Court there decided, that where the decision *was in favor* of the bankrupt, as here, no Federal question arose, and this Court had no jurisdiction.

In the case of Calcote v. Stanton, 18 How. U. S. 243, this Court cited that case with approval. See also same point, Burke v. Gaines & Wife, 19 How. 388.
Ryan v. Thomas, 4 Wall. 603.

It is true that since the decision in Strader v. Baldwin, *supra*, the act of Congress giving jurisdiction to this Court, has been amended, but no change, as to the point now discussed, has been made. See Long *et al.* v. Converse *et al.*, 91 U. S. 113.

So it is clear that this question is not a Federal question.

FOURTH.

As to the motion to affirm. The decision of the State Court on the merits is in perfect accordance with the decision of this Court in Chapman *v.* Forsyth, 2 How. U. S., 202; Neal *v.* Clark, 95 U. S., 704; Hennequin *v.* Clews, 111 U. S., 676; and therefore the maxim of *stare decisis* is applicable.

The State Court decides that the effect of the discharge in bankruptcy, was to discharge the debt, holding that the debt was not created by positive fraud, nor by embezzlement, nor while the bankrupt was acting in a fiduciary capacity. (Facts VII, Record, pp. 1–5.) The debt was simply a breach of contract. Hussey contracted to pay two per cent. per annum for the use of certain bonds, collect the coupons free of charge for Palmer's account, and return the bonds to him on ten days' notice. Hussey received the bonds, and while perfectly solvent deposited them as collateral for loans—a legitimate, and the only use that could be made of them. Through the failure of other parties to pay him, Hussey subsequently became insolvent, and when called on to return said bonds was unable to redeem them; consequently he failed to perform his contract to return them. No positive fraud, or fraud in fact, involving moral turpitude, or intentional wrong, was proved or alleged.

(Facts IV & V, Record, pp. 2, 3, 4, 9, 27, 45–49.)

In Hennequin *v.* Clews, *supra*, a creditor held collateral for his own security and hypothecated it, but, becoming insolvent, was unable to redeem and return it. This Court held, that this was simply a breach of contract, and within the operation of a discharge in bankruptcy. The

case at bar is clearly within the above rule, and equally within the operation of a discharge.

The same doctrine was enunciated by this Court in Neal *v.* Clark and Chapman *v.* Forsyth, *supra.*

FIFTH.

It is respectfully submitted that the motion to dismiss for lack of jurisdiction should be granted; or in case it is not granted, that the judgment or order below should be affirmed.

SAMUEL W. BOWER,
Counsel for Defendant in Error.

No. 445

119-96

In the United States Supreme Court.

ACALUS L. PALMER,
Plaintiff in Error,
against
ERWIN A. HUSSEY,
Defendant in Error.

Brief of defendant in error, in reply, submitted under stipulation.

It is respectfully submitted, that the plaintiff in error's brief does not refute the points made by the defendant in error, in his original brief.

FIRST.

As the record has only just been printed, and there is no rule or practice fixing the time for the motion, it is believed the motion is in time. If any excuse for the delay is needed, it is found in the fact, stated by the plaintiff in his affidavit (p. 1), that Mr. Richard H. Huntley, defendant's original attorney, died in September, 1885.

SECOND.

The plaintiff, in his second, third, and fourth points, presents what he claims are the Federal questions. On examination it will be found that they are the very ques-

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119-96

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SECOND.

The plaintiff, in his second, third, and fourth points, presents what he claims are the Federal questions. On examination it will be found that they are the very ques-

tions discussed in the defendant's brief, in his first, second, and third points; to wit, was the validity of the discharge in bankruptcy contested, and "was the debt in question contracted without positive fraud, and within the operation of, and released by, the discharge in bankruptcy."

I. True, it is stated in different language, but that can make no difference.

The plaintiff calls it, a "case of exemption and exception," and says, that his right to proceed and collect his said judgment was denied, and he was deprived of the same. If he was, as he claims, exempted and excepted from the operation of the statute, then he, and his debt, were entirely unaffected by, and outside the pale of the act, and it inevitably follows that he had, and could claim, no right under it. As this Court has said (in Calcote *v.* Stanton *et al.*, 18 How. 245): "The only 'privilege or exemption' which could have been drawn in question under the act, were those of the defendant, the validity of whose discharge under it was impugned. But as the decision was in their favor, the case is not brought within our jurisdiction."

So in this case, the defendant alone could claim any privilege or exemption under the act, and as the decision has been in his favor no jurisdiction arises.

II. The validity of the discharge was not contested or decided below; the plaintiff's citation (plff.'s brief, p. 9) does not prove it. And when the words "of his defence," omitted from his citation, are supplied, and the context is given, it is obvious that no question as to the validity of the discharge was raised, but that the question raised and decided was, was the defendant "guilty of laches in not sooner availing himself of *his defence* under the bankrupt act" in the State Court (Record, p. 4)—an entirely different question. And, further, the other points raised as to this subject, in the first and second points of the defendant's brief are not met in any way.

III. As to the criticisms by the plaintiff, that the cases cited by the defendant are not in point, it will be found upon reference to the cases that they are in point, and sustain the positions taken, and that the plaintiff has simply failed to truly appreciate their significance.

THIRD.

The plaintiff's fifth point, is an attempt to bring before this Court, the question. Was Hussey concluded by the judgment, from proving that the debt in question was contracted without positive fraud, and discharged by the discharge in bankruptcy?

This is not a Federal question, for it is simply the effect of the judgment in the State courts, as we have before said (defendant's original brief, p. 7)—and this court will not consider it.

FOURTH.

In his sixth point, the plaintiff claims that the Court of Appeals misapprehended its own prior decision.

If it did, a Federal question would not be raised thereby; but there is no proof before this court that it did. There is nothing in the record to show it; and the so-called manuscript opinion, on the 18th page of plaintiff's brief, is not verified or supported in any way. Clearly, the point is wholly immaterial to the case at bar.

FIFTH.

As to the seventh point, (that the affirmance, asked on the ground of delay, should be denied,) it is submitted, that if the decision below was (as is not seriously questioned by the plaintiff) in full conformity with the decisions of this Court, that of itself makes it manifest that the writ was taken for delay only, and justifies an affirmance.

SIXTH.

The criticisms in the eighth and ninth points of the plaintiff's brief, that the cases cited by the defendant are not in point, will not be borne out by an examination of the cases referred to. It will be found that in every instance they are in point, and applicable. For instance, in the citation of Strader *v.* Baldwin (9 How., 261, plaintiff's brief, p. 21), he omits the point, which is: "It is the defendant who has pleaded a privilege or exemption under the Statute of the United States, and relies upon it as his only defence. If the decision of the State Court had been against him, his right to have the case re-examined by this Court could not be doubted. But the decision has been in favor of the right set up under the Statute, the validity of which was denied by the plaintiffs."

In the citation from Calcote *v.* Stanton (18 How., 244), the point is omitted. It is: "The only privilege or exemption which could have been drawn in question under the act were those of the defendant, the validity of whose discharge under it was impugned. But as the decision was in their favor, the case is not brought within our jurisdiction."

SEVENTH.

As to the tenth point raised by the plaintiff in error, that the defendant admits in his own notice of motion, affidavits, and brief, that a Federal question was decided in the State Courts, and exists in this action, we can only say that it is not so; and the citations quoted to prove it do not establish it. For it does not necessarily follow, that because the decision below is in perfect accordance with the decisions of this Court, that a Federal question was raised. This Court decides questions that are not Federal as well as those that are; and the same question may, if the deci-

sion is one way in the Court below, give this Court jurisdiction, and if it is the other way, give this Court no jurisdiction. (Strader *v.* Baldwin, *supra;* Calcote *v.* Stanton, *supra*).

EIGHTH.

The defendant in error should be granted the relief asked for in his notice of motion.

Respectfully submitted,

SAMUEL W. BOWER,
Counsel for Defendant in Error.

119-96

SUPREME COURT OF THE UNITED STATES.

ACALUS L. PALMER,
Plaintiff in Error,

vs.

ERWIN A. HUSSEY,
Defendant in Error.

ARCHIBALD W. SPEIR, being duly sworn, says: That the manuscript decision of the Court of Appeals of the State of New York affirming the order of arrest herein, as printed on page 12 of deponent's brief, is a true copy of a certified copy of said decision received by me from the Clerk of the Court of Appeals of the State of New York.

A. W. SPEIR.

Sworn to before me this 30th October, 1886.

GEO. MCCRANE,
Notary Public,
Kings County.

Certif. filed in N. Y. Co.

119-96

SUPREME COURT OF THE UNITED STATES.

ACALUS L. PALMER,
Plaintiff in Error,

vs.

ERWIN A. HUSSEY,
Defendant in Error.

Plaintiff's affidavit to oppose motion to dismiss writ of error.

City, County and State of New York, ss.:

I. ARCHIBALD W. SPEIR, being duly sworn, says: He is the attorney for the above-named plaintiff in error.

II. Defendant is informed and believes that the citation herein was duly served upon Erwin A. Hussey, the defendant in error herein, on or about the 11th February, 1884.

III. That on or about the 31st October, 1884, deponent received a paper endorsed in this action, and entitled "Joinder in error," signed and endorsed "Richard H. Huntley, attorney for defendant in error." That there was also endorsed and written upon the back of said paper an appearance of Richard H. Huntley as attorney for the said defendant in error.

IV. That deponent is informed and believes that the said Richard H. Huntley died in or about the month of September, 1885.

That afterwards on the 25th of September, 1886, a notice of appearance by Samuel W. Bower, as the attorney for the said defendant in error, was served at deponent's office.

That on the said 25th September, 1886, copies of a notice of motion to dismiss the writ of error herein and a brief were also served at defendant's office, subscribed by the said Samuel W. Bower, as attorney for the plaintiff in error.

That no order or copy-order of substitution of the said Bower as attorney in the place and stead of the said Huntley has been served on deponent. And deponent is informed and believes that the said Bower was the law partner of the said Huntley at the time of the appearance herein by the said Huntley.

V. Deponent further says, in reply to the statement contained in the defendants affidavit on this motion:

That the writ of error herein was allowed by the Honorable Samuel Blatchford, one of the associate justices of this Court, on the 9th February, 1884, on a petition and certified copy of the record in the Court below.

1. That said writ of error is to review on appeal, and correct a final judgment of the Supreme Court of the State of New York, entered on the remittitur of the judgment and decision of the Court of Appeals of said State on the 13th February, 1882, as authorised by the United States Revised Statutes, Section 709, etc., and the practice of this Court (Record, pp. 1, 5, 6, 74, 76, 77).

2. That the said final judgment of the said Supreme Court and the remittitur and decision of the said Court of Appeals *reversed* the orders of the General Term and Special Term made and entered herein, respectively, on the 2d June, 1881, and the 15th March, 1881, *denying the defendant's motion to perpetually enjoin the plaintiff from issuing execution on the judgment and collecting and enforcing the same and the other relief demanded in the defendant's notice of motion* on the ground of his alleged

bankruptcy discharge under the United States Bankrupt Act, apppoved March 2d, 1867, &c. (Record. pp. 5, 6, 71–7).

3. ~~Deponent is of the opinion that~~ the *plaintiff claims that he alleged and proved a case of actual and positive fraud, involving moral turpitude and intentional wrong as distinguished from constructive fraud, against the defendant while acting in a fiduciary capacity as his actual and technical trustee.* The plaintiff thus presented a case of exemption under the 33d Section of the United States Bankrupt Act, approved March 2d, 1867, and Section 5117 of the United States Revised Statutes, as appears from the proceedings, pleadings, Referee's report, judgment in the original action; and also as appears from the proceedings, papers and testimony in the defendant's application for a perpetual stay, the order denying the said motion, and the order of the General Term affirming said order denying said motion, and all of which appears in the record herein. And it also appears from the record herein that the plaintiff's right and title aforesaid to proceed and collect his said judgment, and that his said the exemption and exception of his said judgment under the said 33d Section of the said United States Bankrupt Act, and Section 5117 of the United States Revised Statutes, was denied, and he was deprived of the same by the final judgment of the said Supreme Court upon the remittitur of the judgment and decision of the said Court of Appeals.

VI.—And it also appears from said record that the said defendant's discharge in bankruptcy, dated the 17th of May, 1880, was not granted within the time limited and specified by said 29th section of said act, viz., within one year from the date of the defendant's alleged adjudication as a voluntary bankrupt on the 20th of January, 1868, and that said bankruptcy proceedings, if any there were, had previously lapsed, come to an end, and did not exist when said discharge was granted.

And that the plaintiff was also deprived of his rights, as aforesaid described, to proceed and collect his said judgment by the final judgment of the said Supreme Court upon the remittitur of the judgment and decision of the said Court of Appeals; that the said Court of Appeals is the highest Court of said State, and that the plaintiff was deprived of his said rights by the construction of said United States statute in the aforesaid decision and judgment, and that said construction of said statute was necessary to the said decision and judgment, depriving him of his said rights.

VII. The plaintiff's complaint in the original action states "that the said defendant, without the authority or "permission of the plaintiff, has *fraudulently and wil-* "*fully sold, disposed of and misapplied* the said bonds, "and has refused to deliver up the same to the said plain- "tiff" (Record, p. 21).

That the Referee found on the trial, as conclusions of fact,

"That the said bonds were received by the said defend- "ant *in a fiduciary capacity.*" * * * * "That the said "defendant, without the authority, assent or permission "of the plaintiff, *fraudulently and wilfully sold, dis-* "*posed of and misapplied* the aforesaid bonds" (Record, p. 26).

That a judgment was duly entered in favor of the plaintiff against the defendant for $32,128.57 damages on the 16th of May, 1874.

That the defendant did not appeal from said judgment (Record, pp. 26, 29, 13).

VIII. That on or about the 19th October, 1868, the defendant Hussey was arrested and held in $25,000 bail in this action (Record, p. 21).

That the said order of arrest was affirmed in all things

by a judgment of the Court of Appeals on the 8th May, 1874 (Record, p. 13, 21).

IX. That the defendant states in his affidavit (Record, p. 8) That he filed his petition in bankruptcy on the 20th January, 1868. That the said Palmer was not named as a creditor in said bankruptcy preceedings until September, 1879, which is more than eleven years after said judgment was entered (Record, p. 13).

X. That proceedings supplementary to execution to enforce the collection of said judgment were begun in or about the month of June, 1879.

That in said supplementary proceedings William J. Marrin, Esq., was duly appointed Receiver of the estate and property of the said defendant Hussey on or about the 6th June, 1880.

That on or about the 6th June, 1880, and before the alleged discharge in bankruptcy was obtained, an action was begun by the said Receiver Marrin against the said Hussey and one Wm. M. Taylor to recover certain property belonging to Hussey in satisfaction of the judgment (Record, p. 12).

XI. On or about the 12th June, 1880, the defendant Hussey began an application to perpetually enjoin the collection of the judgment on a notice of motion, and the defendant Hussey's affidavit stating the alleged bankruptcy discharge under the Bankrupt Act of March 2d, 1867, and other matters. (Notice of motion and Hussey's Affidt., Record, pp. 7–11.) The plaintiff, Palmer, opposed this motion for a perpetual stay, &c., on an affidavit of A. W Speir, his attorney, and other papers. (Speir's Affidt., Record, pp. 12–15).

On the 26th August, 1880, the defendant's said motion was denied by the Special Term of the Supreme Court, with leave to defendant to make such application for defense in

Warren

a judgment creditor's action then pending in the Superior Court between W. J. ~~Warren~~, Receiver, &c., of the estate of Erwin A. Hussey against the said Hussey and another, to sell certain property belonging to the said Hussey, to liquidate Palmer's judgment and to set aside Hussey's insolvency proceedings, and an order was entered to that effect. (Westbrook, J., Order of Opinion, Record, pp.16–17).

On or about the 14th December, 1880, the defendant's application for a perpetual stay coming on to be heard before the Hon. Charles Daniels, and an order of reference made, viz.:

"That at the instance and direction of the Court, and for "its proper information as to the facts to be considered, it "is ordered that it be referred to Hon. Wm. H. Leonard" * * * "to take such testimony as may be produced before "him by either party to this cause, as to the circumstances "and facts of the alleged conversion of the plaintiff's "bonds."

On the 10th January, 1881, the plaintiff and defendant and their respective counsel attended the hearing. Mr. Huntley, counsel for the defendant, although the moving party in the application, declined to offer any testimony.

The plaintiff, Palmer, then testified in his own behalf to the facts and circumstances of the cause of action, to prove that the debt or obligation for which the judgment was obtained was exempt and excepted from the effect of the alleged bankruptcy discharge in the defendant's bankruptcy proceedings under Section 33 of said Bankrupt Act.

That afterwards the defendant Hussey was examined by his counsel in rebuttal. (Record, pp. 19–30, 44, 69).

That on the conclusion of the reference the Referee reported the testimony taken on the reference to the Court, and plaintiff's attorney gave due notice that on the report of the Referee, and all the papers and proceedings herein, the adjourned hearing of the motion for a "perpetual stay" will be had, *and an application made on behalf of the*

defendant (misprint for plaintiff in record) that the motion be denied, and for such other relief, &c. (Record, pp. 20–21).

That on the 4th March, 1881, after the above described adjourned hearing was had, *an order was duly made and entered, on motion of the counsel for said Palmer, it was ordered that the motion for a perpetual stay of proceedings on the part of the plaintiff Palmer (missprint for defendant Hussey) be denied, &c.* (Record, p. 72).

On or about the 17th March, 1881, the defendant Hussey appealed from the order denying the application for a perpetual stay, &c., to the General Term of the Supreme Court.

On or about the 6th May, 1881, after the hearing of said appeal the said General Term affirmed the said order of the Special Term denying the motion for a perpetual stay, &c., on the opinion of Daniels, J., in the Court below. (Record, p. 73).

On or about the 3d June, 1881. the defendant Hussey appealed from said order of the General Term affirming the order of the Special Term to the Court of Appeals of the State of New York.

On or about the 18th January, 1881, after the hearing of the last named appeal, the Court of Appeals reversed the orders of the General and Special Terms of the Supreme Court and granted the motion, with costs, and also remitted the record and proceedings to the Supreme Court to be proceeded upon according to law.

That on the 13th February, 1882, a judgment order of the Supreme Court was made and entered on the said judgment and decision of the Court of Appeals of the State of New York reversing the said orders of the General and Special Terms of the Supreme Court denying said motion for a perpetual stay. (Record, pp. 73, 74, 75, 76).

Sworn to before me.

Thos 25th October 1882
Geo McCann
Notary Public
Kings Co
Certificate filed Kings Co

119-96

Supreme Court of the United States.

ACALUS L. PALMER,
Plaintiff in Error,

vs.

ERWIN A. HUSSEY,
Defendant in Error.

Plaintiff's Brief to oppose motion to dismiss Writ of Error.

FIRST.

The defendant's motion to dismiss the writ of error for want of jurisdiction should be denied, or denied with leave to renew, when the case is reached on the general calendar for argument, on the ground that the motion, if made at all, should have been made immediately after the appeal was perfected. The citation was served on the 11th February, 1884, and the appeal perfected, and the papers on this application served September 25th, 1886, two years and a half after the perfection of the appeal.

No grounds are stated in the moving papers for the delay.

Motion Papers, Pl'ff.'s Affidavit, Par. IV.

SECOND.

The facts relied on by the plaintiff to give the Court jurisdiction are, viz.:

1st. That the plaintiff presented a case of exemption and exception under the 33d Section of the U. S. Bankrupt Act, approved March 2d, 1867, and Section 5117 of the United States Revised Statutes, as appears from the record herein in the pleadings, proceedings, Referee's report and judgment in the original action. And also as appears in the record herein in the proceedings, papers and testimony in the defendant's application for a "perpetual stay," the order denying the said motion and the order of the General Term affirming said order denying said motion.

And that it also appears from the record herein that the plaintiff's right and title aforesaid to proceed and collect his said judgment, and that his said exemption and exception of his said judgment under the said 33d Section of the United States Bankrupt Act, and Section 5117 of the United States Revised Statutes *was denied, and he was deprived of the same* by the final judgment of the said Supreme Court upon the remittitur of the judgment and decision of the said Court of Appeals.

2d. And it also appears from said record that the said defendant's discharge in bankruptcy, dated the 17th May, 1880, was not granted within the time limited and specified by the said 29th section of said act, viz., within one year from the date of the defendant's adjudication as a voluntary bankrupt on the 24th of January, 1868, and that said bankruptcy proceedings, if any there were, had previously lapsed, come to an end and did not exist when said discharge was granted.

And it also appears from the record herein that the plaintiff's right and title aforesaid to proceed and collect

his said judgment, and that the plaintiff was also deprived of his rights as aforesaid, described to proceed and collect his said judgment by the final judgment of the said Supreme Court upon the remittitur of the judgment and decision of the said Court of Appeals. That the said Court of Appeals is the highest court of said State, and that the plaintiff was deprived of his rights by the construction of said United States Statute in the aforesaid decision and judgment, and that said construction of said statute was necessary to the said decision and judgment depriving him of his said rights.

See third point stating facts from record, &c.

THIRD.

Facts from the record showing plaintiff presented a case of exemption and exception.

On or about the 12th of June, 1880, the defendant Hussey began an application to perpetually enjoin the collection of the judgment on a notice of motion, and the defendant Hussey's affidavit stating the alleged bankruptcy discharge under the Bankrupt Act of March 2d, 1867, and other matters (Notice of Motion and Hussey's Affidavit, Record, p. 7–11).

The plaintiff Palmer opposed this motion for a perpetual stay, &c., on an affidavit of A. W. Speir, his attorney, and other papers (Speir's Affidavit, Record, p. 12–15).

On the 26th August, 1880, the defendant's said motion was denied by the Special Term of the Supreme Court, with leave to defendant to make such application or defense in a judgment creditor's action then pending in the Superior Court between W. J. Marvin, Receiver, &c., of the estate

of Erwin A. Hussey, against the said Hussey and another, to sell certain property belonging to the said Hussey, to liquidate Palmer's judgment and to set aside Hussey's insolvency proceedings, and an order was entered to that effect. (Westbrook, J., Order ~~of~~ and Opinion, Record, pp. 16, 17.)

The defendant Hussey appealed to the General Term from this last-named order, and on the hearing of the appeal the order was reversed and the motion for a "perpetual stay" sent to the Special Term of the Supreme Court for a hearing on the merits and an order entered accordingly. (Record, pp. 17, 18.)

On or about the 14th December, 1880, the defendant's application for a perpetual stay coming on to be heard before the Hon. Charles Daniels, an order of reference was made, viz.:

"That at the instance and direction of the "Court, and for its proper information as to the "facts to be considered, it is ordered that it be "referred to Hon. Wm. H. Leonard" * * * "to take such testimony as may be produced be- "fore him by either party to this cause, as to the "circumstances and facts of the alleged conver- "sion of the plaintiff's bonds." (Order of Reference Record, p. 19.)

On the 10th January, 1881, the plaintiff and defendant and their respective counsel attended the hearing. *Mr. Huntley, counsel for the defendant, although the moving party in the application declined to offer any testimony. The plaintiff Palmer then testified in his own behalf as to the facts and circumstances of the cause of action,* to prove that the debt or obligation for which judgment was obtained was exempt and excepted from the effect of the alleged bankruptcy discharge in the defendant's bankruptcy proceedings under Section 33 of said Bankrupt Act. That

afterwards the defendant Hussey was examined by his counsel in rebuttal. (Record, pp. 19, 30–44, 69.)

That on the conclusion of the reference the Referee reported the testimony taken on the reference to the Court, and plaintiff's attorney gave due notice that on the report of the Referee, and all the papers and proceedings herein, the adjourned hearing of the motion for a perpetual stay will be had, *and an application made on behalf of the defendant (misprint for plaintiff in record) that the motion be denied and for such other relief, &c.* (Record, pp. 20–21.)

That on the 4th March, 1881, after the above-described adjourned hearing was had, *an order was duly made and entered, on motion of the connsel for the said Palmer, it was ordered that the motion for a perpetual stay of proceedings on the part of the plaintiff Palmer (misprint for defendant Hussey) be denied, &c.* (Record, p. 72.)

On or about the 17th March, 1881, the defendant Hussey appealed from the order denying the application for a perpetual stay, &c., to the General Term of the Supreme Court.

On or about the 6th May, 1881, after the hearing of said appeal the said General Term affirmed the said order of the Special Term denying the motion for a perpetual stay, &c., on the opinion of Daniels, J., in the Court below. (Record, p. 73.)

On or about the 3d June, 1881, the defendant Hussey appealed from said order of the General Term affirming the order of the Special Term to the Court of Appeals of the State of New York. On or about the 18th January, 1881, after the hearing of the last-named appeal, the Court of Appeals reversed the orders of the General and Special Terms of the Supreme Court and granted the motion, with costs, and also remitted the record and proceedings to the Supreme Court to be proceed upon according to law.

That on the 13th February, 1882, a judgment order of the Supreme Court was made and entered on the said judgment and decision of the Court of Appeals of the State of

New York reversing the said orders of the General and Special Terms of Supreme Court denying said motion for a perpetual stay, &c. (Record, pp. 73, 74, 75, 76.)

Statement of Original Transaction.

On 5th May, 1865, the defendant Hussey, as a broker, purchased one hundred and forty United States Bonds 7–10, par value $18,600, and deposited them with Brown Brothers & Co. on Palmer's account and order.

Seven months afterwards, viz., on 23d December, 1863, Hussey purchased on Palmer's account and order one 5–20 bond, par value $1,000 (Record, p. 46).

Hussey, for the purpose of obtaining possession of the $18,600 worth of bonds that were deposited with Brown Brothers, and using them in his business as capital, informed Palmer that Brown Brothers would not be responsible for the bonds if stolen or burned, and that they would charge one half of one per cent. for collecting coupons, and that he, Hussey, was going into the banking business and would hold them for nothing, having a proper safe to keep them in, and would allow Palmer two per cent. per annum (Record, pp. 30, 32, 33).

On the 10th May the defendant received the bonds on plaintiff's order from Brown Brothers and the receipt dated May 11th, 1866 (Record, p. 27).

(*Copy Receipt.*)

"NEW YORK, May 11th, 1866.

"A. L. PALMER, Esq., Dorchester, N. B.

"DEAR SIR:

"We yesterday received from Messrs. Brown Brothers & "Co. the following U. S. Bonds:

" Ten (10) 73-10 U. S. Bonds, numbers 62,422, " 62,423 and 62,441 to 62,448, of $500 each, is	5,000 00
" One hundred and thirty-two (132) 73-10 U. S. " Bonds, 136,108, 136,109, 136,001 to 136,100, " 135,957 to 135,984, 125,153 and 125,154, of " $100, is	13,200 00
" Eight (8) 73-10 U S. Bonds, numbers 69,021 to " 69,028, $50 each, is	400 00
" One (1) U. S. 6 per cent. 5-20, for $1,000, is .	1,000 00
" Total.	19,600 00

"The 73-10 bonds only were received from Brown Bros. " & Co. The 5-20 was held by us as advised, December 23, " 1865. These bonds we hold subject to the order of A. L. " Palmer, at ten days' notice, agreeing to collect the cou- " pons for his account, free of charge, and to allow him two " per cent. per annum interest on par value of said bonds, " said interest to commence and count June 1st, 1866, in- " terest on the 73-10 bonds, payable June and December " 15th, on 5-20 May and November 1st.

"E. A. HUSSEY & Co."

(Record, p. 27.)

That on the 2d January, 1868, when a demand for the bonds was made on behalf of the plaintiff on the defendant he refused to deliver them (Record, p. 27–8).

The following cases cited in the defendant's brief under the first point, first subdivision, that no federal question was raised specifically in the State courts *are not in point*, and not in any manner similar to the case at bar,

Detroit R.R. Co. *v.* Guthard, 114 U. S. R., 136, Waite, C. J.: * *

" Upon the trial of this action the only question in dis- " pute was as to the validity of the tax. * * *

" The record certainly does not show that any such claim " was made in the State courts, or that such a question was

" raised or presented for decision, or that it was decided. " Nothing of the kind appears either in the pleadings or the " findings of facts, on which alone the case was heard in the " Supreme Court."

Cockroft *v.* Vose, 14 Wal., 5, Miller, J.:

" On the whole we do not find from anything in the " record of this case that the question relied on here was " decided against the right claimed by the plaintiff in " error."

FOURTH.

The plaintiff denied and contested the validity of the defendant's bankruptcy proceedings in the court below, and it appears in the record.

Defendant says in his affidavit in the application for a perpetual stay (1st paragraph): On the 20th January he filed his petition in bankruptcy and was adjudicated a bankrupt on the 24th January, 1868, and on the 17th May, 1880.

Then the defendant states his excuse and only excuse for a delay of over twelve years in obtaining his discharge, viz.:

"That at the time of my adjudication in bankruptcy " aforesaid, I was practically without any funds whatever " or any means wherewith to conduct the proceedings, and " was unable to pay the expenses of the officers and the " fees of counsel in the proceedings.

"That by reason of said lack of means there was a delay " in the prosecution of the bankruptcy proceedings, and " during all that time I was unable to procure any business or " do anything to raise money, and was therefore compelled " to remain idle, and to suffer the bankruptcy proceedings " to lie unprosecuted.

"That in this action my counsel, having engaged in it, " carried it on for me without the payment of his fees, and " they remain still unpaid.

"That afterward, as soon as I could obtain the means, " said proceedings in bankruptcy were prosecuted and con- " ducted to a successful termination, and my discharge was " obtained as already stated.

"That among other grounds of objection to my discharge " in bankruptcy, made by the plaintiff, it was charged I " have been guilty of improper and undue delay in said " proceedings.

"That that question was presented to the Court and " fully explained, and the Court decided that I was not " guilty of laches, and was entitled to my discharge" (Record, Defendant's Affid., pp. 8–9).

The plaintiff's affidavit opposing the motion for a perpetual stay, states, paragraph XIII., p. 14:

"That as to the allegations contained in the latter part " of the 1st paragraph of Hussey's affidavit at fol. " the true fact is the Judge in bankruptcy overruled the " objections that were made to the discharge without pass- " ing upon the validity of the bankrupt proceedings, which " is proved by the order vacating the stay, a copy of which " is attached" (Record, p. 14; see Exhibits A and B., Record, pp. 15, 16).

The decision of the Court of Appeals says as to the validity of the defendant's bankruptcy proceedings and discharge:

"The respondent argues further that the debtor has been " guilty of laches in not sooner availing himself under the " Bankrupt Act, &c., &c." (Record, p. 4).

The statement in defendant's affidavit on this motion, paragraph III., p. 4:

"No question was raised as to the validity of the dis-
"charge, neither was any proof to such effect offered or
"received, *is therefore erroneous and incorrect.*"

The statements in the defendant's brief, first point, p. 5, first and second subdivisions, that no question as to the validity of the discharge in the record *are erroneous and incorrect.*

The following cases cited in defendant's brief under first point, second subdivision, that no federal question was raised below *are not in point, and not in any manner similar to the case at bar.*

Simmerman *v.* Nebraska, 116 U. S., 57, Waite, *C. J.:*

"The fact that after final judgment and on petition for
"a writ of error to this Court, which seems to have been
"treated also, as a petition for a rehearing, a federal ques-
"tion was presented is not enough."

Susquehanna Boom Co. *v.* West Branch Boom Co., 110 U. S., 57:

Same ruling as in Simmerman *v.* Nebraska.

Warfield *v.* Chaffee *et al.*, 91 U. S., 690, October, 1875. Opinion of the Court, Waite, *C. J.:*

"The petition for the allowance of the writ in this
"court is not part of the record in the court below. We
"act only upon that record; and that does not show any
"federal question was either presented by the pleadings
"or upon the trial in the District Court."

Worthey *v.* The Commissioners, 9 Wal., 611, Chase, *C. J.:*

"Right does not appear to have been set up."

Hoyt *v.* Sheldon, 1 Black., U. S., 514, Taney, *C. J.*:

"It must appear upon the transcript filed by the plaintiff in error that the point on which he relies was made in "the New York Court, and decided against by the State "Court, and the right which he now claims here claimed "under it."

Farney *v.* Towle, 1 Black., U. S., 350:

No right raised below.

FIFTH.

The whole conduct of the defendant from the beginning of the transaction upon which this action is based was fraudulent and corrupt. It proves that his excuses for a failure to complete his bankruptcy proceedings and for the hypothecation and misappropriation of the bonds are unworthy of credence, and cannot be accepted as reasons for sustaining the judgment of the Court below.

The defendant's sworn answer, the Referee's report and additional findings, show that a *charge of perjury could* have been made and sustained on the statements and facts contained in those papers.

Defendant's answer alleges the following defenses, viz.:

"*First.*—That he denies that he received the bonds from "the plaintiff as his agent and broker; and that he received "them in a fiduciary capacity upon any arrangement and "agreement whatever; that he fraudulently or wilfully sold, "disposed of or misapplied the said bonds, and he denies "that he has in any way used said bonds otherwise than "as is provided in the agreement set forth as a part of the

" complaint, as was well understood between the plaintiff " and this defendant that said bonds should be used."

" *Second.*—And further answering, this defendant says " that for a long time prior to May 11th, 1866, he had had " mutual dealings with the plaintiff, through the agency " of the plaintiff's brother, one Stephen W. Palmer, that " said transactions were of the usual and ordinary kind " existing between merchants in this city and parties re- " siding abroad, the plaintiff then and now residing in the " British Province of New Brunswick.

" That this defendant was then a shipping and commis- " sion merchant, and as such transacted business with and " for the plaintiff; that some time prior to May 11th, 1666, " this defendant, under instructions from the plaintiff, and " as his agent, bought through Messrs. Brown Bros. & Co. " all the bonds set out in the said agreement, except 5–20 " bond [therein mentioned, that afterwards this defendant " bought for the plaintiff the said 5–20 bond], and kept " the same in his possession with the plaintiff's knowledge " and assent.

" That after the purchase of all the said bonds, this " defendant changed his business from that of a shipping " and commission merchant to that of a banker and stock- " broker, and in view of such change suggested to the " plaintiff that he in such business could use profitably for " himself the said bonds of the plaintiff if he was disposed " to lend them to this defendant.

" That thereupon, and for the purpose of this defendant " using said bonds in his business as a broker and banker, " to raise money therewith, and thereby to increase his " capital, and to use the same as money; this defendant " agreed that if the plaintiff would loan him said bonds, he " would collect the coupons thereto attached free of charge, " and pass the proceeds of said coupons so collected to the " credit of the plaintiff, and that he would, in addition

" thereto, pay to the plaintiff, at the rate of two per centum " per annmm, extra interest for the use of said bonds.

"That said bonds were taken by this defendant under " said agreement, and were used by him strictly in accord- " ance therewith, and not otherwise."

" *Fourth.*—And as a separate and distinct defense to any " claim which the plaintiff may seek to establish against " this defendant by reason of said agreement annexed to " the complaint, and by reason of the loan of said bonds, " this defendant says that between the 11th day of May, " 1866, and the month of December, 1867, there were " accounts and dealings between the plaintiff and this de- " fendant; that said account contained large debits and " credits; that in latter part of said month of December, " 1867, the plaintiff, through his said agent, Stephen W. " Palmer, and this defendant, had a full and complete settle- " ment and adjustment of their accounts, in which settle- " ment the plaintiff was credited the full value of said " bonds, and on said settlement it was found and adjusted " that the plaintiff was indebted to this defendant in the " sum of $1,415.60; that this defendant has paid the plain- " tiff in full for said bonds, and does not and did not at " the commencement of this action, owe him anything " herein."

" *Third.*—And further answering, and as a separate " and distinct defense, this defendant says that the " agreement annexed to the complaint herein, and " forming a part thereof, and the agreement herein- " before set forth, is and was in itself corrupt and " usurious and contrary to and in violation of the usury " laws of the State of New York, in which State said " contract was made, and was intended to be an agree- " ment to pay more than seven *per centum*, to wit, " nine *per centum per annum* for the use, loan and " forbearance of money, and by said agreement this

" defendant agreed to pay said usurious rate to the " plaintiff and the plaintiff agreed to receive the same " for said loan, then and there made.

" *Fourth.*—And further answering, and as a separate " and distinct defense to any claim which the plaintiff " may seek to establish against this defendant by reason " of said agreement annexed to the complaint, and by " reason of the loan of said bonds, this defendant says " that between the 11th day of May, 1866, and the " month of December, 1867, there were accounts and " dealings between the plaintiff and this defendant; " that said account contained large debits and credits; " that in the latter part of said month of December, " 1867, the plaintiff, through his said agent, Stephen " W. Palmer, and this defendant had a full and com- " plete settlement and adjustment of their accounts, in " which settlement the plaintiff was credited the full " value of said bonds; and that on said settlement it " was found and adjusted that the plaintiff was in- " debted to this defendant in the sum of fourteen hun- " dred and fifteen dollars and sixty cents ($1,415.60); " that this defendant has paid the plaintiff in full for " said bonds, and does not and did not at the com- " mencement of this action owe him anything thereon.

" *Fifth.*—And further answering, and as a set-off " and counterclaim to any sum to which the plaintiff " may appear to be entitled on the trial of this action, " and repeating and now alleging all that has been " hereinbefore alleged as a defense, this defendant says " that during the time of his said business connection " with the plaintiff he paid, laid out and expended, for " and on account of the plaintiff, large sums of money " in the purchase of merchandise, stocks and United " States bonds, and sums greatly in excess of any and " all sums received by him from the plaintiff, includ-

"ing said bonds and their proceeds, and that at the "termination of said business connection, in the month "of December, 1867, an account was stated between "the plaintiff and this defendant, whereby it was "found, and such was and is the fact, that the plain- "tiff was indebted to this defendant for and on account "of said sums so paid, laid out and expended for the "plaintiff in the sum of $1,415.60, after crediting the "plaintiff with all sums received from him, and also "with the proceeds of said bonds at their then market "value; and this defendant demands judgment against "the plaintiff for said sum of $1,415.60, besides the "costs of this action."

Referee's Additional Findings.

"*Second.* — In respect to the second question or "request in said order contained, I find that the "defendant did not pay out the proceeds of the "United States Government bonds, mentioned and "referred to in the complaint, or any portion thereof, "for two thousand shares of the Perego Gold Mining "and Tunnel Company's stock, bought on the plain- "tiff's order by the defendant as stock broker.

"*Third.*—I find the facts of said last-mentioned "transaction to be as follows:

"That in or about the month of June, 1867, the "defendant requested the plaintiff to send to him an "order for the purchase by the defendant, in the name "of the plaintiff, of two thousand shares of the said "Perego Gold Mining and Tunnel Company's stock, "and stated that if the plaintiff would do so, he, the "said defendant, would furnish all the money neces- "sary to purchase and hold said stock, and would bear "and pay all the loss, if any, arising out of the sale

" thereof, and would allow the plaintiff one-half of any
" profit that might accrue therein for the use of his
" name. That to induce the plaintiff to allow the
" defendant so to use his name, and as a reason for
" making such request, the defendant represented to
" the plaintiff that he, the said defendant, was debarred
" and prevented from purchasing the said stock in his
" own name by an agreement with certain parties who
" were interested in, and with whom he, the said
" defendant, was engaged in manipulating said stock.
" That the said plaintiff consented that the said
" defendant might so use his name in the purchase of
" said stock, but expressly refused to become the
" owner or part owner thereof, or responsible in any
" way for the result of the transaction. And I further
" find that the said plaintiff never was nor became the
" owner or part owner of said stock, but that defendant
" was and continued to be the actual owner thereof."

SIXTH.

The Court of Appeals' opinion sustains and bases the defendant's claim to a right to use the bonds on an erroneous and incorrect report of the decision of that court, made on the affirmation of the order of arrest in this action in December, 1874, and printed in the 59 N. Y. R., 647, and not in accordance with the manuscript copy decision on file. A copy of both is hereto annexed.

The Court did not decide on this order of arrest that the defendant had any right to use the bonds, as would appear from the memoranda of the case in the 59 N. Y., 647, and this the Court of Appeals seems to have used as an authority in their last decision, which is appealed from herein.

The Court did not decide on the order of arrest as stated in the memoranda 59 N. Y., 747: " *That although by the*

"*agreement it appeared that some use might be made by* "*the defendant of the bond*, yet the agreement clearly im- "plied that no use was authorized, inconsistent with defend- "ant's duty to return the specific securities."

The Court did decide, as stated in the manuscript decision:

"The provision that the return was to be made on a "notice of ten days, and that defendant should allow "interest at the rate of two per cent. per annum, *may* "*warrant the inference that it was contemplated by the* "*parties that some use might be made of them by the* "*defendant, but the other parts of the agreement clearly* "*imply that no use was authorized which was inconsist-* "*ent with the defendant's primary undertaking and* "*duty to return the specific securities on the request of* "*the plaintiff*. The defendant was bound to so keep them "under his control that he could, within the time limited, "after notice to do so, return them to the owner."

That is the other part of the "receipt" requiring the return of the specific bonds. No right to hypothecate the bonds was authorized.

As the defendant did hypothecate the bonds and was unable to return them, such a use was not authorized.

The Court of Appeals says, in the decision appealed from:

"We have already held, in an earlier appeal, that what- "ever right he may have had to use these bonds, he had "none inconsistent with his duty to return them. *But to* "*some use of them he was certainly entitled.*

"*It is absurd to suppose that he was to pay two per* "*cent. for the mere privilege of keeping securely the plain-* "*tiff's bonds.*

"We are puzzled, as Palmer seems to have been, to "understand what possible use of the bonds was contem- "plated and paid for, except as security for loans. We "can discern no fraud in that case."

It is clear the Court of Appeals assumed that in the decision on the order of arrest they had decided the bonds could be hypothecated.

The MSS. Decision of the Court of Appeals, affirming the order of arrests reads, viz.:

ANDREWS, J.

The deposit of the bonds with the defendant upon his agreement to return them, on ten days notice, and his subsequent refusal to return them, on demand made pursuant to the agreement under which they were deposited rendered him liable to an action for their conversion, in which he could be arrested, under Sec. 179 of the Code.

It is clear from the contract of May 11, 1866, that the plaintiff did not intend to part with his title to the bonds. The defendant agreed to hold them subject to plaintiff's order, and to collect the coupons for his account without charge. The provision that the return was to be made on a notice of ten days, and that the defendant should allow interest at the rate of two per cent. per annum on the value of the bonds, may warrant the inference that it was contemplated by the parties that some use might be made of them by the defendant, but the other parts of the agreement clearly imply that no use (was) authorized which was inconsistent with the defendant's primary undertaking and duty to return the specific securities on the request of the plaintiff.

The defendant was bound to keep them so under his control, that he could within the time limited, after notice to do so, return them to the owner. The case for an arrest was made out by the facts appearing in the affidavit presented to the Judge upon which the order was granted, in connection with the facts stated in the sworn complaint in the action which was also before him, and which may be regarded as an affidavit for the purposes of the motion.

The order should be affirmed.

The decision of the Court of Appeals affirming the order of arrest as stated in the 59 N. Y. Rep., 647, under the caption of "Causes not Reported in Full" reads, viz.:

"This was an appeal from a Gen-
"eral Term order, affirming an order
"of the Special Term, denying a
"motion to vacate an order of arrest.

"The papers showed that the plain-
"tiff transferred to the defendant
"certain United States bonds under
"an agreement, by which after speci-
"fically describing the bonds by
"numbers, it was stated that they
"were to be held subject to the
"plaintiff's order at ten days notice,
"defendant to collect the coupons
"free of charge and to allow two per
"cent. per annum interest on the par
"value of the bonds. Defendant
"refused to deliver them on demand
"made pursuant to the agreement.

"Held, that although by the agree-
"ment it appeared that some use
"might be made by defendant of the
"bonds, yet the agreement clearly
"implied that no use was authorized
"inconsistent with defendant's duty
"to return the specific securities,
"and defendant was bound to so
"keep them under his control, that
"he could, within the time limited
"return them; that defendant was
"therefore liable to an action for
"conversion and the order of arrest
"was properly granted.

"The order of arrest was granted
"upon affidavits and upon the com-
"plaint which was verified and was
"presented with the affidavits.

"Held, that the complaint might
"be regarded as an affidavit for this
"motion."

SEVENTH.

The application for affirmance on the ground that the plaintiff's appeal by writ of error was taken for delay should be denied.

That portion of defendant's notice of motion and affidavit that relates to the application for affirmance for delay *does not state any actual delay, past or present, caused by the plaintiff, or that this appeal has caused or causes any injury to the defendant.*

The notice of motion states only as a ground for affirmance the *bare allegation*, p. 2, "that the writ was taken for delay only"; also "such decision is in full conformity with "the decisions of this Court in the following cases: Chap-"man *v.* Forsyth, 2 How., 202; Neal *v.* Clark, 95 U. S., "704; Henneguin *v.* Clews, 111 U. S., 676."

The defendant's affidavit, paragraph IX., p. 6, states: "In my opinion the question in this case is settled by the doctrine promulgated by this Court in those cases."

The defendant's brief, p. 2, alleges a conformity with these decisions.

The pleadings, proceedings, referee's report and defendant's application for a stay, and testimony taken therein, all show the bonds were deposited in good faith for safe keeping, and fraudulently misapplied intentionally by the defendant.

EIGHTH.

The cases cited in the defendant's brief under the second point, that no federal question was decided by the State courts, *are not in point*, and not in any manner similar to the case at bar.

Lange *v.* Benedict, 99 U. S. R., 68, October, 1878, action for damages in State Court for false imprisonment.

WAITE, *C. J.:*

"In the present case the Court of Appeals of New York "held * * * the defendant in error is not liable in "damages for the false imprisonment, because in pronounc- "ing judgment, in which the imprisonment was had, he "acted as a judge in his judicial capacity, and not so en- "tirely in excess of his jurisdiction as to make it the arbi- "trary unlawful act of a private person. This is not a "federal question."

Montgomery *v.* Hernandez, 12 Wheat., 129, February, 1827.

TRIMBLE, *J.:*

In an action on a marshall's bond for breach of condition in the State Court in the injured party's name, and defendant's claim should have been brought in the name of the United States. Held, no federal question.

Also held:

When proceedings are suspended by appeal, so that party injured has no right to demand money or to sue for the recovery of it, his right of action has not accrued, so as to bar it if not commenced in six years.

Knox *v.* Exchange Bank, 12 Wal., 379, December, 1870.

MILLER, *J.:*

Improvement of the obligation of contracts.

"It must be the Constitution or Statute of the State "which impairs the obligations of a contract, or the case "does not come within our jurisdiction."

It does not appear that the Court considered the obligation of any contract impaired.

Northern R.R. *v.* The People, 12 Wal., 379, December, 1870.

MILLER, *J.* :

"The principles announced in the preceding case (Knox "*v.* Exchange Bank) govern the present one."

NINTH.

The following cases cited in defendant's brief under the third point, viz., "Was debt in question contracted without positive "fraud, and within the operation of and released by the "discharge in bankruptcy, is not a federal question," *are not in point, and not in any manner similar to the case at bar.*

Strader *v.* Baldwin, 9 How., 261, January, 1857, Grier, J.:

"The declaration had the *common courts in assumpsit.* "The defendant appeared and pleaded his discharge (in "bankruptcy). The plaintiffs denied the validity of this "discharge, on the ground that the debt was incurred by "defendant while acting as a clerk or bookkeeper in a "fiduciary capacity. * * * The plaintiffs have set up "no act of Congress in their pleadings under which they "support their claim or title to recover." Held, no jurisdiction.

It seems no federal question was raised by the record, and also that the action was on contract and not in tort, and that the replication was insufficient in such a case to raise the issue of fiduciary capacity.

Calcote *v.* Stanton, 18 How., 244, December, 1855, Grier, J.:

"The record before us presents no evidence that such a

" question (federal question) did arise or could have been
" decided. * * *

" And we may add, moreover, that we see no reason,
" from anything that appears on this record, why the State
" court might not have dismissed the bill, as devoid of
" equity, and as exhibiting a claim which if not champer-
" tous, is on its face a lititigious speculation in state, aban-
" doned, and as to much the larger portion wholly
" unfounded demands."

In this case there is no evidence of a federal question in the record, and besides the Court says the State court had other grounds for dismissing the bill.

Burke *v.* Gaines, 19 How., 388, December, 1856, Taney, J.:

Facts stated in opinion (land title under the laws of the United States).

" The plaintiff in error offered no evidence of title in
" himself, although he was in possession of the land. * *

" It appears, therefore, that no right was claimed by the
" plaintiff in error under any act of Congress, or any
" authority derived from the United States." * *

Ryan *v.* Thomas, 4 Wal., 603, December, 1866, opinion of the Court, Chase, C. J., land title.

The plaintiff claimed title to land under a United States patent. The Court below held the patent not void.

" The patent offered by the plaintiffs seems to have
" been the only authority under the United States drawn
" in question in the State court, and the decision was in
" favor of its validity. It is only in such a case the decision
" is against the authority that this Court has revisory
" jurisdiction."

TENTH.

The defendant *admits* in his notice of motion, affidavit and brief *that a federal question was decided in the State courts, and exists in this action.*

1st. Defendant states in his notice of motion, p. 2:
"Such decision is in full conformity with the decisions of "this Court in the following cases:
"Chapman *v.* Forsyth, 2 How. U. S., 202.
"Neal *v.* Clark, 95 U. S., 704.
"Hennequin *v.* Clews, 111 U. S., 676."

2d. Defendant states in his brief, p. 2:
"The decision below is in full conformity with the "decision of this Court in the cases of" (and cites the three above cases).

3d. Defendant states in his affidavit, par. 9, p. 6:
"That the Court of Appeals decision * * * is in "perfect accordance with the doctrine of this Court in "those cases" (and cites the three above cases).

4th. Defendant states in his brief, 4th point, p. 9:
"The decision of the State Court is in perfect accordance "with the decision of this Court" (and cites the three above cases).

The defendant, having admitted that a federal question does exist, to sustain his application for one part of his motion, cannot deny effect of the admission as to the other. He cannot admit jurisdiction for one purpose, and deny it for another.

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" And we may add, moreover, that we see no reason, " from anything that appears on this record, why the State " court might not have dismissed the bill, as devoid of " equity, and as exhibiting a claim which if not champer- " tous, is on its face a lititigious speculation in state, aban- " doned, and as to much the larger portion wholly " unfounded demands."

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119-96

Supreme Court of the United States.

ACALUS L. PALMER,
Plaintiff in Error,

vs.

ERWIN A. HUSSEY,
Defendant in Error.

Plaintiff's Brief in Reply.

First Point.

The defendant's motion to dismiss the writ of error should be denied, or denied with leave to renew when the case is reached on the general calendar.

1st. Plaintiff's brief, first point, shows that this motion *is made two years and a half after* the perfection of the appeal, and that *no grounds or excuses for the delay are stated* in the defendant's affidavit and brief.

2d. Defendant does not state in his "Brief in Reply" that the death of Mr. Huntley was the cause of the delay, and Record, p. 7, shows that Mr. Bower was one of the attorneys for the defendant in the original application for a perpetual stay of proceedings made in the State Court in June, 1880.

3d. There is neither a "Joinder in Error," an appearance of any attorneys nor any matter stated in the Record showing that a "Joinder in Error" has been filed, or that any attorney has appeared for the defendant herein.

4th. Plaintiff's affidavit, paragraph 4, p. 2, shows that no order or copy-order of this Court substituting the said Bower for the said Huntley, deceased, has been served upon defendant's attorney.

5th. This motion to dismiss the writ of error *as made by the defendant involves an examination* of the testimony and all the questions before the Court on this appeal at bar, and if heard, should be heard at the argument of the appeal when reached on the general calendar.

Second Point.

On January 20th, 1868, the defendant filed his petition in bankruptcy, and was adjudicated a bankrupt on the 24th January, 1868.

The defendant did not name the plaintiff as a creditor, nor did the plaintiff have any knowledge of the existence of the bankruptcy proceedings, until about September, 1879, *when defendant filed amended schedules and stated the defendant as a creditor, eleven years after the adjudication in bankruptcy* (Record, pp. 8, 13).

The original action was begun in October, 1868, by the service of the complaint, nine months after the defendant's alleged adjudication in bankruptcy, and of which the plaintiff had no knowledge until he had begun a creditors' action in 1879 to liquidate his judgment.

The plaintiff alleges in the complaint that he was the
ertain United States bonds.
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f as his agent, and ~~taken~~ in a fiduciary ca-
* * *
the defendant without authority or permission
" *of the plaintiff, has fraudulently and wilfully sold,*

"*disposed of and misapplied said bonds and refused to* "*deliver up the same to the said plaintiff, who had fre-* "*quently demanded the same*" (Case, fols. 93, 94; Record, fols. 57–58).

Defendant's answer stated:

First Defense.—"He denies that he received said bonds "from the plaintiff as his agent or broker." * * *

"That he received them in a fiduciary capacity." * *

"That he had fraudulently or willfully sold, disposed of "or misapplied said bonds." * * *

"That he has in any way whatever used said bonds "otherwise than as is provided in the agreement set forth "as a part of the complaint, and was well understood "between the plaintiff and this defendant that said bonds "should be used."

Second Defense.—That plaintiff and defendant had mutual dealings with each other.

That prior to May 11th, 1866, defendant bought all the bonds, except the 5-20 bonds, through Brown Brothers & Co., and kept them in his possession with plaintiff's knowledge and assent. That after the purchase of all the bonds the defendant became a banker and broker, *and suggested to the plaintiff that he could use the bonds to increase his capital, and the defendant did agree he could use the bonds.*

That defendant agreed to pay two per cent. commission extra interest for the use of the bonds, and that the bonds were used as permitted by that agreement.

Third Defense.—That this agreement was usurious.

Fourth Defense.—That in December, 1867, there had been a settlement of account between these parties through S. W. Palmer, and the plaintiff was on that accounting indebted to defendant in $1,415.60, and had paid the plaintiff in full for said bonds.

4th. Plaintiff's affidavit, paragraph 4, p. 2, shows that no order or copy-order of this Court substituting the said Bower for the said Huntley, deceased, has been served upon defendant's attorney.

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The plaintiff alleges in the complaint that he was the owner of certain United States bonds.

"*That the same were received by the defendant from the "plaintiff as his agent, and* ~~*taken*~~ *in a fiduciary ca-"pacity.*" * * *

"*That the defendant without authority or permission "of the plaintiff, has fraudulently and wilfully sold,*

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Fifth Defense. Counterclaim.—That a settlement of account had been made, and counterclaims over the value of the bonds for $1,415.60.

Record, fols. 60–62.

Plaintiff Palmer's Reply.—The reply denied all the material allegations of the answer.

The Trial of the Issues and Judgment.—All the issues of fact and law were referred to Josiah Sutherland and Francis M. Scott, as Referees, to hear and determine the same, *and who found as conclusions of fact*, viz.:

"*That the said bonds were received by the defendant* "(*Hussey*) *in a fiduciary capacity.*" * * *

"*That the defendant, without authority, permission or* "*consent of the plaintiff, fraudulently and wilfully* "*disposed of and misapplied said bonds.*"

And as conclusion of law, "that the plaintiff is entitled "to a judgment in this action against the defendant for "said sum of $29,578.72."

A judgment was duly entered on the 16th May, 1874, confirming the Referee's report for $32,128.57 damages in favor of the plaintiff Palmer, and against the defendant Hussey.

Judgment posted, Record, fols. 64–71.

No appeal was taken from said judgment within the time limited by law.

At the time the original action was begun, in October, 1868, the defendant was arrested and held in $2,500 bail, the order of arrest was granted on the sworn complaint and affidavit stating that a demand for the bonds had been made.

That the defendant appealed from the order of arrest to

the General Term and also to the Court of Appeals, both Courts affirming the order of arrest (Record, p. 13).

That on the 15th October, 1874, the defendant Hussey *made a voluntary assignment under* the State insolvent law for exoneration from arrest, &c., and on or about the 2d January, 1875, he made a general assignment (Record, p. 9–10).

Supplementary Proceedings to Enforce Judgment.— That proceedings supplementary to execution to enforce the collection of said judgment were begun in or about the month of June, 1879.

That in said supplementary proceedings William J. Marrin, Esq., was duly appointed receiver of the estate and property of the said defendant Hussey.

That on or about the 6th June, 1880, and before the alleged discharge in bankruptcy was obtained, an action was begun by the said receiver Marrin against the said Hussey and one Wm. M. Taylor to recover certain property belonging to Hussey, and liquidate the plaintiff's judgment (Record, p. 12–15).

That in *September*, 1879, the defendant amended his bankruptcy proceedings, and named the plaintiff as a creditor; that the plaintiff had no knowledge of said bankruptcy proceedings until that time (Record, p.

It is clear the bankrupt. were not prosecuted in and were a nullity.

Third Point.

The record in the case at bar shows that the federal question of exemption and exception under the 33d Section of the Bankrupt Act and Section 5117 of the Revised Statutes is identically the same federal question that is raised in Hennequin *v.* Clews, 111 U. S., 682; Neil *v.* Clarke, 95 U. S., 704, and similar to the federal question raised in

Chapman *v.* Forsyth, 2 How., 202, under the Bankrupt Act of 1841.

The record in the case at bar shows that the federal question of the invalidity of the bankruptcy proceedings was raised under the 29th Section of the Bankrupt Act; that the defendant did not apply for his discharge in one year from the date of adjudication.

The statements and claims contained in the defendant's briefs that no federal question was raised, are based on the fact that the Court below decided against the exemption and exception of the plaintiff's judgment and in favor of the validity of the bankrupt proceedings, and in favor of the defendant and against the plaintiff.

Fourth Point.

In the case at bar the plaintiff claims the bonds were deposited with the defendant for *safe keeping.* "*That the "said bonds were received by the said defendant in a "fiduciary capacity*"; * * that the defendant, "without "the authority, assent or permission of the plaintiff, fraud- "ulently and wilfully sold, disposed of and misapplied the "said bonds."

That plaintiff has proved a case of actual and positive fraud, involving moral turpitude and intentional wrong as distinguished from constructive fraud, against the defendant while acting in a fiduciary capacity as an actual and technical trustee.

That in the case of Hennequin *v.* Clews, and Chapman *v.* Forsyth, the debt arose out of business transactions between the parties, and that business custom permitted a use of the property deposited. In Neil *v.* Clark the defendant was a purchaser.

The plaintiff claims that the case at bar is not similar to the above-named cases.

Fifth Point.

The motion should be denied.

A. W. SPEIR,
Counsel and Attorney for Plaintiff in Error.